(14)

No. 04-1581
Title: Wisconsin Right to Life, Inc., Appellant
v.
Federal Election Commission
Docketed: May 25, 2005
Lower Ct: United States District Court for the District of Columbia
Case Nos.: (04-1260)
Decision Date: May 10, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 23 2005	Statement as to jurisdiction filed. (Response due June 24, 2005)
Jun 17 2005	Order extending time to file response to jurisdictional statement to and including July 25, 2005.
Jul 25 2005	Motion to dismiss or affirm filed by appellee Federal Election Commission.
Aug 1 2005	Reply of appellant Wisconsin Right to Life, Inc., filed.
Aug 10 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 27 2005	PROBABLE JURISDICTION NOTED.
Oct 18 2005	Motion to dispense with printing the joint appendix filed by appellant Wisconsin Right to Life, Inc.
Nov 1 2005	SET FOR ARGUMENT ON Tuesday, January 17, 2006.
Nov 14 2005	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Nov 14 2005	Brief amicus curiae of American Civil Liberties Union filed.
Nov 14 2005	Brief amicus curiae of Mitch McConnell filed.
Nov 14 2005	Brief of appellant Wisconsin Right to Life, Inc., filed.
Nov 14 2005	Brief amicus curiae of Alliance for Justice filed.
Nov 14 2005	Brief amicus curiae of Citizens United and Citizens United Foundation filed.
Nov 14 2005	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Nov 14 2005	Brief amicus curiae of Coalition of Public Charities filed.
Nov 14 2005	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed.
Nov 14 2005	Brief amici curiae of Center for Competitive Politics, et al. filed.
Nov 17 2005	CIRCULATED.
Nov 25 2005	Record received from U.S.D.C. for District of Columbia t. (1 box)
Dec 19 2005	Brief of appellee Federal Election Commission filed. (Distributed)
Dec 19 2005	Brief amici curiae of Norman Ornstein, Thomas Mann, and Anthony Corrado filed. (Distributed)
Dec 19 2005	Brief amicus curiae of Professor Francis R. Hill filed. (Distributed)
Dec 19 2005	Brief amicus curiae of Douglas L. Bailey filed. (Distributed)
Dec 19 2005	Brief amici curiae of AARP, et al. filed. (Distributed)
Dec 19 2005	Brief amici curiae of John McCain, Christopher Shays, and Martin Meehan filed. (Distributed)
Jan 5 2006	Reply of appellant Wisconsin Right to Life, Inc., Appellant filed. (Distributed)
Jan 17 2006	Argued. For petitioner: James Bopp, Jr., Terre Haute, Ind. For respondent: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C.
Jan 23 2006	Judgment VACATED and case REMANDED. Opinion per curiam.

Docket for 04-1581

Supreme Court, U.S.
FILED

041581 MAY 23 2005

OFFICE OF THE CLERK

No. 04-_____

In The
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

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May 23, 2005

Questions Presented

1. Whether as-applied challenges are permitted to the prohibition on corporate disbursements for electioneering communications at 2 U.S.C. § 441b after *McConnell v. FEC*, 540 U.S. 93 (2003).

2. If so, whether the prohibition on electioneering communications is unconstitutional as applied to the facts of this case, and particularly

(a) the three particular grass-roots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. here and/or

(b) grass-roots lobbying communications generally, as carefully defined,

with any communications to be funded either from a general corporate account or, alternatively, from a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E). App. at 19a.

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

Wisconsin Right to Life, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

Notice of Statutory Expedition & Advancement on the Docket

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress specified that in reviewing constitutional challenges, such as the present one, "[i]t shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." BCRA § 403(a)(4), 116 Stat. at 114, App. at 23a.

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Introduction

May a court in a facial challenge prohibit *all* future as-applied challenges to a statute? May it do so for all time, all parties, all fact situations, and all constitutional claims (even those based on rights not raised in the first case)? And did this Court actually do so in *McConnell v. FEC*, 540 U.S. 93 (2003)?

In *McConnell*, this Court upheld against a facial challenge § 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), entitled "prohibition of corporate and labor union disbursements for electioneering communications" ("the prohibition"). 540 U.S. at 203-09. The prohibition bans corporations from using general corporate treasury funds for targeted broadcast communications that reference a federal candidate for thirty days before a primary election and sixty days before a general election. *See* App. at 18a-21a, 24a-32a. Wisconsin Right to Life, Inc. ("WRTL") was not a party in *McConnell*.

After *McConnell*, but before the 2004 primary and general elections in Wisconsin, WRTL challenged the prohibition as applied to either (a) three particular grass-roots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. and/or (b) grass-roots lobbying communications generally, with the communications to be funded either from a general corporate account or from a separate bank account to which only individuals may contribute. WRTL does *not* challenge the electioneering communication disclaimer and disclosure provisions and will comply with them, so that there is no issue as to hidden identity or activity.

The district court dismissed the case with prejudice, not because *McConnell* precludes *this* challenge, but because *McConnell* supposedly precludes *all* future as-applied challenges to the prohibition. App. at 2a. And the district court dismissed the case on that ground without ruling on completely briefed and fully dispositive cross-motions for summary judgment (denying them as moot). App. at 1a.

Foreclosing the possibility of all future as-applied challenges is unprecedented, and neither the district court nor the Federal Election Commission ("FEC") has cited any holding that such blanket claim preclusion is even possible. It defies reason, reality, and justice to assume that a court could foresee all future factual variants by all possible claimants and decide against them in advance. It also defies Article III and the adjudicatory principles of this Court, which both forbid courts to decide cases not before them and give advisory opinions as to any or all future claims.

What if the FEC had said "no," instead of "yes," in Advisory Opinion 2004-31, when asked if candidate Russ Darrow's name could be used in broadcast ads (that would otherwise qualify as electioneering communications) by the automobile dealerships bearing his name, but no longer under his day-to-day management? Would an as-applied claim by the dealerships have to be dismissed because *McConnell* precluded all as-applied challenges?

What if a candidate is a party to a class-action suit and notices need to be broadcast to reach class members during the prohibition period? Would the due process rights of class members be entitled to no consideration in an as-applied challenge to the prohibition?

What if a federal candidate is a party to a bankruptcy and notices need to be broadcast to creditors? Will creditors rights be ignored because *McConnell* doesn't allow any future as-applied challenges?

What if a products liability lawyer hears that some new drug has just been pulled off the market by the FDA and he wants to broadcast ads to attract class action clients against the drug company involved, but he happens to be a candidate and the FEC tells him his situation isn't like Russ Darrow's? Is he not entitled to his day in court?

WRTL's claim was dismissed with prejudice, so it is forever barred from making any future as-applied claim against the electioneering communication prohibition. And

since the district court is the only court that may hear claims against BCRA until January 1, 2007, BCRA § 403(d), App. at 22a, everyone else in America is similarly barred until then. There will be no circuit splits soon, if ever.

WRTL asks this Court to note probable jurisdiction, reverse the district court, and decide the case on the merits, which is appropriate because (a) both parties moved for fully dispositive summary judgment (denied as moot), (b) Congress specified expedited consideration of challenges to BCRA,[1] and (c) the 2006 elections rapidly approach. Alternatively, WRTL asks this Court to summarily reverse the district court's dismissal and remand this case with instructions to expeditiously decide on the merits the already briefed cross-motions for summary judgment.

Opinions Below

The unreported district court *Order* and *Memorandum and Order* dismissing this case with prejudice are at 1a and 2a (Appendix). The unpublished opinion denying preliminary injunction is included at 4a because the memorandum dismissing the case said that the court did so "for the reasons set forth in its prior opinion." App. at 2a-3a. Case documents are available at http://www.dcd.uscourts.gov/ with PACER.

Jurisdiction

The *Order* and *Memorandum and Order* dismissing this case were dated May 9, and filed May 10, 2005. WRTL's *Notice of Appeal of Dismissal to U.S. Supreme Court* was filed and served on May 12, 2005. App. at 33a. Appeal is taken pursuant to 28 U.S.C. § 1253 (direct appeal to the Supreme Court from decisions of three-judge courts denying a permanent injunction) and BCRA § 403(a)(3) (direct appeal to the Supreme Court of the district court's "final decision"). App. at 23a.

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[1]Congress required expedition and advancement on the docket in the district court and in this Court "to the greatest extent possible." BCRA § 403(a)(4), App. at 23a.

Constitutional, Statutory & Regulatory Provisions

The First Amendment to the Constitution is at 18a.
2 U.S.C. § 434(f)(1)-(3) (definition) is at 18a.
2 U.S.C. § 441b(a)-(b)(2) (prohibition) is at 21a.
BCRA § 403 (jurisdictional statute) is at 23a.
11 C.F.R. § 100.29 (definition) is at 24a.
11 C.F.R. § 114.2(a)-(b) (prohibition) is at 29a.
11 C.F.R. § 114.14 (prohibition) is at 31a.

Statement of the Case

During the summer of 2004, the filibustering of nominees to the federal bench reached its peak and WRTL launched a grass-roots lobbying campaign to encourage its two United States Senators to oppose filibusters in upcoming votes. But WRTL had to file suit seeking declaratory and injunctive relief to allow it to fund (1) the three broadcast of advertisements at Exhibits A-C, App. 13a-17a, and (2) similar grass-roots lobbying ads, because Sen. Feingold was a candidate in the September 14, 2004, primary and the November 2, 2004, general elections and the ads became prohibited electioneering communications. *See* App. at 18a-21a (definition). So WRTL was prohibited from paying for the ads with general corporate funds from August 15 to November 2. *See* App. at 21a-23a (prohibition).

On July 28, WRTL filed its verified complaint and sought a preliminary injunction to permit continued running of its grass-roots lobbying ads. A three-judge court was convened pursuant to BCRA § 403(a)(1). App. at 23a. WRTL's preliminary injunction motion was denied August 12th, with a *Memorandum Opinion and Order* issued August 17th. App. at 4a.

In its complaint and other filings, WRTL noted that the ongoing filibuster issue seemed to be coming to a head before the election, which was why it desired to broadcast the ads at that time. It had been reported that on July 23, 2004, the number of federal judicial nominees whose confirmation votes were being filibustered reached double

digits. *Senate Democrats Block 3 More Bush Judicial Nominees*, Washington Post, July 23, 2004, at A05. Further, the Senate leadership intended to bring up for vote additional judicial nominees throughout the fall and "by year's end Democrats could have to filibuster as many [as] 16 nominees for the entire 108th Congress." Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1.

WRTL began broadcasting the advertisement at Exhibit A on July 26 and broadcast B and C shortly thereafter. *See* App. at 13a-17a. WRTL intended to continue running the ads throughout the late summer and fall to influence the votes of Senators Kohl and Feingold on the current and expected filibusters. The ads became electioneering communications on August 15, so WRTL ceased running them.

WRTL is a nonprofit, nonstock, ideological Wisconsin corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code. WRTL does not qualify for any exception permitting it to pay for its broadcast ads from corporate funds.

There are several factors that indicate that the broadcast ads are authentic grass-roots lobbying and not electioneering: (1) they concern only a legislative matter; (2) the only reference to a clearly-identified federal candidate is a statement urging the public to contact the candidate and ask that he take a particular position on the legislative matter; (3) the ads contain no reference to any political party; (4) they contain no reference to the candidate's record or position on any issue; (5) they contain no reference to the candidate's character, qualifications or fitness for office; (6) they contain no reference to the candidate's election or candidacy; (7) they focus only on particular or specific, pending legislative action as opposed to a general issue; (8) they contain no words that promote, support, attack, or oppose a candidate; (9) they contain information for the person whom the communication urges the audience to contact (by reference to a website); (10) the federal candidate referenced is an incumbent; (11) the ads identify two

incumbent Senators; (12) they refer to a candidate and non-candidate and deal with them equally; (13) they deal with currently ongoing legislative action that was reported to be coming to a head during the prohibition period and the timing of the legislative action was beyond the control of the communicator; (14) they dealt with an issue in which the communicator had a clear and long-held interest; (15) they were run outside the prohibition periods as well as within them (had injunctive relief permitted); (16) they could have been run only with money from a "segregated bank account" under 2 U.S.C. § 434(f)(2)(E) (only donations from qualified individuals) if necessary to obtain injunctive relief. Moreover, WRTL does *not* challenge the disclaimer and disclosure requirements, so there would be full transparency.

Broadcast advertisements are the most effective form of communication for a grass-roots lobbying campaign, and non-broadcast communications would not have provided WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message.

Using funds from WRTL's federal political committee fund ("WRTL-PAC") was an inadequate option. As of August 6, 2004, WRTL had $13,766.90 in its WRTL-PAC account. This money is the only money that WRTL could use for federal contributions and independent expenditures. 2 U.S.C. § 431(8) and (17) (definitions). If WRTL-PAC funds had been used for the grass-roots lobbying ads, those funds would not have been available for the contributions and independent expenditures that WRTL intended to make.

The approximately $14,000 in funds in the WRTL-PAC account in early August of 2004 would not have been sufficient for the planned advertising expenditures, even if WRTL has not planned to use the $14,000 for its federal independent expenditures and contributions. The total projected cost of WRTL's grass-roots lobbying campaign was $100,000. However, PAC money is difficult to raise, because it is subject to the source, amount, and disclosure requirements of the Federal Election Campaign Act ("FECA"), and

WRTL believed that it could not raise sufficient funds in its PAC to fund the grass-roots lobbying campaign.

While the 2004 election is past, this case is not moot because WRTL intends to do similar grass-roots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period. Amended Verified Complaint for Declaratory and Injunctive Relief ¶ 16.[2] Further, election cases are classic examples of the exception to the mootness doctrine for cases that are capable of repetition yet evading review.[3]

The Questions Presented Are Substantial

This case presents two substantial questions: (1) may all future as-applied challenges be foreclosed by one opinion and did this Court even purport to do so with respect to electioneering communications in *McConnell v. FEC*, 540 U.S. 93, and (2) is an exception to the electioneering communications prohibition constitutionally required for genuine grass-roots lobbying?

The first question is immediately before this Court

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[2] In addition to ongoing judicial filibusters, WRTL has an interest in grass-roots lobbying as to a broad range of currently hot social issues that the legislative and executive branch often deal with in periods before elections, including embryonic stem cell research, cloning, abortion (including partial-birth abortion), fetal pain legislation, Medicare policy, foreign aid policy, nutrition/hydration withdrawal, health-care rationing, assisted suicide, euthanasia, non-discrimination in medical training and practice, and campaign finance reform. *Id.*

[3] *See Norman v. Reed*, 502 U.S. 279, 287-88 (1992); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003); *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Florida Right to Life v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001); *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 390 n.3 (4th Cir. 2001); *Stewart v. Taylor*, 104 F.3d 965, 969-70 (7th Cir.1997); *New Hampshire Right to Life v. Gardner*, 99 F.3d 8, 18 (1st Cir.1996); *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999).

because the district court dismissed the case on the basis that *McConnell* precludes all future as-applied challenges to the electioneering communication prohibition. WRTL asks the Court to reverse the district court on the first issue.

WRTL cannot pursue the second question unless this Court reverses the district court on the preclusion issue. If this Court reverses the district court, WRTL requests the Court to either rule on the merits or remand the case to the district court to expeditiously rule on the already filed and fully briefed cross-motions for summary judgment. This Court should do this expeditiously, as Congress specified at BCRA § 403, and in advance of the 2006 election season.

I. *McConnell* Neither Considered Nor Barred As-Applied Challenges.

The members of this Court can, of course, readily do what the district court could not—definitively determine what this Court meant by various statements in *McConnell*. But as shall be shown, the language and logic of the *McConnell* opinion indicate that it did not sub silentio establish a major change in the law to preclude all future as-applied challenges to the electioneering communication prohibition. And other considerations would prevent it.

A. *Broadrick* and Article III Require As-Applied Challenges.

In upholding the electioneering communication provision against a facial challenge, *McConnell* cited *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), for the proposition that facial overbreadth must be substantial.[4]

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[4] *McConnell* concluded its overbreadth analysis as follows:

> We are therefore not persuaded that *plaintiffs have carried their heavy burden* of proving that [the prohibition] is overbroad. See *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Even if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not "justify prohibiting all enforcement" of the law unless its application to protected speech is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 120 (2003). Far from establishing that BCRA's *application to pure issue ads* is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion. [*McConnell*, 540 U.S. at 207 (emphasis added).]

Broadrick recognized (as did *McConnell* by relying on it) that, where a facial challenge fails, any overbreadth is dealt with in as-applied challenges: "[The challenged act] is not substantially overbroad and . . . whatever overbreadth may exist should be cured through *case-by-case analysis* of the fact situations to which its sanctions, assertedly, *may not be applied*." *Broadrick*. 413 U.S. at 615-16 (emphasis added). So future as-applied challenges were recognized in *McConnell* and must be permitted.

This is also supported by Article III of the U.S. Constitution, which prevents federal courts from deciding cases not before them. *See, e.g.*, Charles Alan Wright, *Law of Federal Courts* at 54-59 (1983). So *McConnell* could not have decided the present as-applied challenge. It was not before the Court.[5] And based on reason and real-life experience, how could any court, in a facial challenge, foresee and decide all possible future factual situations that might arise so as to foreclose all future as-applied cases?

B. *McConnell* Expressly Eschewed Such Overbroad Reading of Precedent.

Based on Article III and prudential principles, this Court has created the avoidance principles summarized by Justice Brandeis in *Ashwander v. Tennessee Valley Author-*

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[5] This Court does sometimes declare matters nonjusticiable. That is not at issue here, and the Court clearly articulates when matters are nonjusticiable. *Compare Davis v. Bandemer*, 478 U.S. 109 (1986) (partisan gerrymandering claims held justiciable) *with Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality declared them nonjusticiable).

ity, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The second Article III-based principle is that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,'" nor will it "decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *Id.* at 346-47 (citation omitted). The first prudential principle is that "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Id.* at 347 (citation omitted). Under these principles, this Court in *McConnell* could not have decided the present as-applied question in its *Broadrick*-based analysis.

McConnell expressly rejected any analysis going beyond the "precise facts" before the Court. While all courts considering the issue had decided that *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), created a constitutionally-mandated express advocacy test, *McConnell* declared the test a result of statutory construction and said that such overbroad reading of precedent violated a fundamental jurisprudential tenet.[6] It would be highly incongruous if *Buckley* and *MCFL* could not be read as establishing a constitutionally-required express advocacy test but the less-clear language of *McConnell* must be read to have decided

[6]The *McConnell* majority said that precedent must be read narrowly:

> We have long "rigidly adhered" to the tenet "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *United States* v. *Raines*, 362 U.S. 17, 21 (1960) (citation omitted), for "[t]he nature of judicial review constrains us to consider the case that is actually before us," *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., dissenting). Consistent with that principle, our decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech. [*McConnell*, 540 U.S. at 192-93.]

all future cases whose "precise facts" were not before the Court. These fundamental tenets forbid it.

C. The FEC Argued in *McConnell* that As-Applied Challenges Should Be Brought Later, and *McConnell*'s Overbreadth Analysis Mandates It.

McConnell was litigated and decided as a facial challenge. *See, e.g.*, 540 U.S. at 203-07. In the district court, the FEC argued that no as-applied situations could possibly be considered, but must be left for later.[7] The FEC conceded overbreadth of up to six percent, but argued that later as-applied challenges were the solution for such overbreadth.[8]

[7]In the district court the FEC argued for later as-applied challenges:

> [N]one of these plaintiffs . . . has described particular advertisements, referring to clearly identified candidates for federal office, that they plan to run in proximity to one or more federal elections, to which they contend BCRA's application would be unconstitutional. Accordingly, to prevail, the Title II plaintiffs must establish that BCRA's regulation of electioneering communications "could never be applied in a valid manner," or is "substantially overbroad." *New York State Club Ass'n*[*v. City of New York*], 487 U.S. [1,] 11 [(1988)]; [*City of Los Angeles v.*] *Taxpayers for Vincent*, 466 U.S. [789,] 796-798 [(1984)]. [Redacted Brief of Defendants at 131, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582).]

[8]The FEC argued for later as-applied challenges as follows:

> the definition's overbreadth is no more than two to six percent—a far cry from the substantial overbreadth necessary to invalidate a statute on its face. Even if a few genuine issue ads will be subject to BCRA's regulation of electioneering communications, the Court "cannot conclude that [BCRA] is substantially overbroad and must assume that 'whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may be applied.'" *New York State Club Ass'n*, 487 U.S. at 14 (quoting *Broadrick*, 413 U.S. at 615-56). [Redacted Brief of Defendants at 161, *McConnell*, 251 F. Supp. 2d 176.]

In this Court, the FEC argued the same.[9] Intervenors Senators McCain and Feingold and other prime BCRA sponsors also argued for leaving as-applied challenges until later.[10] The FEC tries to have it both ways by now arguing that as-applied challenges are precluded.

McConnell merely followed defendants' proposal to leave as-applied challenges as the solution for sorting out communications such as grass-roots lobbying, a solution likely also compelled by the press of time on this Court. Consequently, the Court brushed aside concerns about "genuine issue ads" and focused solely on "sham issue ads," calling them the "functional equivalent" of express advocacy. *Id.* at 206.[11]

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[9]"To the extent that the definition is not *perfectly* tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis, where a court would at least have the benefit of adjudicating the applicability of Title II to a concrete controversy." Brief for the FEC (Final Version) at 105-06, *McConnell*, 540 U.S. 93 (02-1674) (emphasis in original).

[10]BCRA's primary sponsors argued for later as-applied challenges:

> Title II poses little risk of the sort of chilling effect that can justify the facial invalidation of an overbroad law. . . . These corporat[ions] . . . are not likely to be chilled in their speech, or to be unable to assert their rights if and when there is a realistic threat that the Act may be applied to them in some unconstitutional way. In these circumstances, awaiting as-applied challenges, arising in specific factual contexts, is by far the wiser course. [[Redacted] Brief for Intervenors at 64, *McConnell*, 540 U.S. 93 (No. 02-1674).]

[11]That "sham issue ads" were the primary focus of *McConnell* is evidenced by a section entitled "Issue Advertising" in which this Court repeatedly refers to the ads as "so-called issue ads," 540 U.S. at 126-39, followed by a section entitled "Senate Committee Investigation" wherein the Court focused on the problem of "sham issue ads." *Id.* at 129-32. No section discussed authentic grass-roots lobbying. Comparing the frequency of pejorative terms for issue ads to discussion of genuine issue ads confirms the point. *Compare id.* at 126 ("so-called issue ads" twice), 128 (same twice), 129 ("bogus issue advertising"), 131 ("issue advertising designed to influence federal elections"; "sham issue advocacy"), 170 ("bogus issue advertising"), 185 ("sham issue ads"; "sham issue advertising"), 193 ("so-called issue advocacy"), 205 (same twice) *with id.* at 193 ("true issue ad"), 206 & n. 88 ("genuine issue ads" twice).

That this Court left open the option of as-applied challenges is clear in how it treated the overbreadth challenge to the prohibition. After the *McConnell* majority decided there was a compelling interest, *id.* at 205, a common next step in strict scrutiny would be to decide if Congress had narrowly tailored the prohibition to the interest. The Court didn't use the term "narrow tailoring," instead saying that "plaintiffs . . . challenge the [electioneering communications ban] on the ground that it is . . . overbroad," *id.* at 204, because "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* at 206.

But BCRA's plaintiffs did not just allege that the ban was "overbroad." They insisted that the electioneering communication prohibition was not narrowly tailored to a compelling governmental interest, using strict scrutiny terminology.[12]

Plaintiffs often complain that a statute is "overbroad" when they mean that it is not narrowly tailored to effectuate only its compelling interest.[13] In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), this Court did the same when it was conducting a narrow

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[12]The "Business Plaintiffs" titled a section "The Electioneering Communication Standard Is Not Narrowly Tailored." Opening Brief of the "Business Plaintiffs" Chamber of Commerce et al. at 36, *McConnell*, 540 U.S. 93 (No. 02-1755). The AFL-CIO had a section captioned "The Primary Definition Is Not Narrowly Tailored." Brief of AFL-CIO Appellants/Cross-Appellees at 16, *McConnell*, 540 U.S. 93 (No. 02-1755).

[13]*Cf.*, Brief for Appellants/Cross-Appellees Sen. Mitch McConnell et al. at 50, *McConnell*, 540 U.S. 93 (No. 02-1674) ("[T]he 'electioneering communications' provisions are so overbroad that they cannot be sustained under any theory consistent with the First Amendment.").

tailoring analysis under strict scrutiny and spoke at one point of its analysis in overbreadth terminology. *Id.* at 655, 657, 660-61. But using "overbroad" to mean "not narrowly tailored" can be confusing because in First Amendment jurisprudence there is also the "substantial overbreadth" doctrine, which has to do with facial challenges and permits what is sometimes perceived as a form of third party standing. *See, e.g., Broadrick*, 413 U.S. 601.[14]

The *government* must prove that its restriction on free expression is narrowly tailored to a compelling governmental interest. *See, e.g., Austin*, 494 U.S. at 675. But the *plaintiff* must prove substantial overbreadth warranting facial invalidation. *Broadrick*, 413 U.S. at 613.

Often strict scrutiny establishes whether there are *any* applications of the ban that are unconstitutional before asking whether those applications are substantial.[15] BCRA's

[14]The narrow-tailoring version of "overbreadth" was described in *SUNY v. Fox*, 492 U.S. 469 (1989), where this Court said that "[t]he person invoking the . . . narrow-tailoring rule asserts that the acts of his that are the subject of the litigation fall outside what a properly drawn prohibition could cover." *Id.* at 482 (emphasis omitted). The facial-challenge variety of "overbreadth" arises when a defendant whose conduct may be regulated argues that, while his activity may be regulated, the applicable statute is an invalid rule that reaches substantial amounts of constitutionally-protected activity by non-parties. *Broadrick*, 413 U.S. at 612.

[15]That evaluating tailoring was a typical next step was demonstrated in *McConnell*. The Court employed formal narrow tailoring analysis when answering the argument that § 323(b) "is substantially overbroad because it federalizes activities that pose no conceivable risk of corrupting or appearing to corrupt federal officeholders," 540 U.S. at 166, and would be expected to do the same in answering the similar argument that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communication." *Id.* at 206.

prime sponsors argued things in this sequence.[16]

But *McConnell* said that the plaintiffs' challenge was about "overbreadth," declared that there was a compelling interest (the first step of strict scrutiny), then moved directly to a *Broadrick* "overbreadth" analysis that concluded "[w]e are therefore not persuaded that *plaintiffs* have carried their heavy burden of proving that [the prohibition] is overbroad." *Id.* at 207 (emphasis added). Since plaintiffs didn't bear the burden of proving narrow tailoring, the Court obviously declined to decide whether specific applications of the ban were narrowly tailored. The Court noted that the ban likely reached protected speech that Congress may not regulate (thereby implying that the tailoring was not narrow without appropriate exceptions), 540 U.S. at 206 n.88 ("we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads"), but wanted to deal with such issues on an as-applied basis, i.e., the Court did not believe the facial overbreadth was substantial.[17]

This Court began its *Broadrick* overbreadth analysis by

[16]They argued narrow tailoring in a section entitled "Title II Is Narrowly Tailored To Serve Compelling Public Interests," [Redacted] Brief for Intervenor-Defendants at 56, *McConnell*, 540 U.S. 93, then argued that "Facial Invalidation Of Title II Would Be Especially Inappropriate," *id.* at 62, and "Plaintiffs Have Not Demonstrated Substantial Overbreadth." *Id.* at 64. The FEC followed the same sequence. Brief for the FEC, Et Al. at 90, 103, *McConnell*, 540 U.S. 93.

[17]The *McConnell* record evidence in the district court was that between 7% and 64% of the communications during the applicable period before the 1998 elections were not "sham" at all, i.e., that the regulation of as little as 36% of the ads encompassed by BCRA was supported by the interests proffered by the government. *McConnell*, 251 F. Supp. 2d at 309-10 (Henderson, J.). In *Mills v. Alabama*, 384 U.S. 214 (1966), the Court struck down a ban on speech that affected only one day, i.e., only .27% of a year. The FEC conceded as high as 6% overbreadth in the District Court. Redacted Brief of Defendants at 161, *McConnell*, 251 F. Supp. 2d 176.

declaring that plaintiffs' lack-of-justification argument "fails *to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.* at 206 (emphasis added). This was only demonstrated as to what the Court called "sham issue ads"[18] and not as to such other public communications as grass-roots lobbying. Because WRTL's ads asking listeners

[18]*McConnell* clearly identified what the Court meant by that term, beginning with a section entitled "Issue Advertising." 540 U.S. at 126. First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples). *See also id.* at 196-97 (Title II analysis: "concealing their identities," "dubious and misleading names").

Second, the Court noted that "sham issue ads" closely resembled express advocacy ads. Both such ads and express advocacy ads "were used to advocate the election or defeat of clearly identified federal candidates," *id.*, and *McConnell* provided an immediate example of what it meant by that: "Little difference existed, for example, between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 126-27. In its discussion of BCRA Title II, the Court returned to this aspect of "sham issue ads" with this example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> > "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." 5 1998 Senate Report 6305 (minority views).
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity. [540 U.S. at 193 n.78.]

No such sham ads are at issue on these facts.

to call a legislator, who happened to be a candidate, and ask him to vote a certain way on pending legislative action were not "sham issue ads" and were never of a type proven to be the "functional equivalent" of express advocacy, banning such an ad is unsupported by any governmental interest.

McConnell acknowledged the evidentiary dispute as to "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those . . . time spans but had no electioneering purpose," insisting that "the vast majority of ads clearly had such a purpose." *Id.* "Vast majority" is the language of a "substantial" overbreadth analysis, and the Court's statement acknowledges that *some* issue ads may not constitutionally be regulated but that under a facial challenge the ban must be upheld because the overbreadth was not "substantial." The necessary implication is that those other issue ads must be the subject of as-applied challenges.[19]

D. *McConnell*'s Language Presupposed As-Applied Challenges.

McConnell also plainly indicated that the usual as-

[19]There was one facially challenged provision that received as-applied analysis in *McConnell*, indicating that as-applied challenges are appropriate and that *McConnell* decided the first. It had to do with whether the electioneering communication "prohibition," 540 U.S. at 203, applied to *MCFL*-type nonprofit corporations. *Id.* at 209-11. BCRA granted an exemption in one provision and took it away in another. *Id.* at 209 n.90. The Court said, "That [BCRA] does not, on its face, exempt *MCFL* organizations from its prohibition is not a sufficient reason to invalidate the entire section." *Id.* at 211. It noted that "the Government itself concedes that § 316(c)(6) does not apply to *MCFL* organizations" and recognized an as-applied exception for such corporations, presuming that Congress knew such an exception was required. *Id.* at 211. This shows that when the Court in *McConnell* wanted to deal with as-applied matters it did so clearly with clear terminology. *Id.* at 209-11 ("except insofar as it applied," "objection to applying," "does not on its face exempt," "could not validly apply to *MCFL*-type entities," "does not apply to *MCFL* organizations," "could apply," "as so limited"). There was no such discussion of grass-roots lobbying.

applied challenges must be permitted. This Court first suggested that one way to eliminate the chill on "genuine issue ads" in "doubtful cases" was to sidestep the definition of the prohibition or use PAC funds. 540 U.S. at 206. But WRTL's proposed ads are not properly in the "doubtful" category,[20] and the Court nowhere indicated that those were the only options. Another option was indicated in footnote 88: "[t]he interests that justify the regulation of campaign speech *might not apply* to the regulation of genuine issue ads." *Id.* (emphasis added). If "the interests . . . might not apply," then a case-by-case challenge is the approved mechanism for sorting out when a restriction on genuine issue ads is not narrowly tailored to a compelling governmental interest. *See infra* at 26-27 (re *McConnell* note 88).

As already noted, *McConnell* employed *Broadrick* overbreadth analysis, holding that "[f]ar from establishing that BCRA's application to pure issue ads is substantial,

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[20]The sort of grass-roots lobbying ads proposed here would not fall into the category of "doubtful" because they in no way promote, support, attack, or oppose a candidate. There are conceptually three types of "genuine issue ads":

1. genuine issue ads that omit reference to a federal candidate, and thus present no problem under the electioneering communication provision.

2. genuine issue ads that include a reference but also present no problem—for example, because they contain no words that could conceivably be construed to involve "promoting, supporting, attacking, or opposing a federal candidate."

3. genuine issue ads that include such a reference but raise some question of how they might be read: i.e., those making up the "doubtful cases." In this last case, laboring under this doubt, the organization might pay for the ad with a PAC. [Robert F. Bauer, *Wisconsin Right to Life in the Supreme Court: The Prospects for Salvaging "As Applied" Challenges to BCRA*, http://moresoftmoney hardlaw.com/articles/20040913.cfm (*More Soft Money Hard Law* Web Updates) (visited Feb. 16, 2005).]

The "doubtful" category is third in this list, but WRTL's ads fall into the second category.

. . . the record strongly supports the contrary conclusion." *Id.* at 207. This indicates that the ban reaches speech that Congress may not regulate, i.e., the tailoring was not narrow, but the Court wanted to deal with such issues on an as-applied basis.

And as noted, when the Court declared that plaintiffs' lack-of-justification argument "fails *to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy," *id.* at 206 (emphasis added), this functional equivalence was demonstrated concerning "sham issue ads," not such other public communications as grass-roots lobbying. So the "extent" question remains open. The Court acknowledged that there was an evidentiary dispute as to "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those . . . time spans but had no electioneering purpose," insisting that "the vast majority of ads clearly had such a purpose." *Id.* at 206. This acknowledges that there are *some* genuine issue ads that may not constitutionally be regulated by Congress, but that under a facial challenge the ban must be upheld because the overbreadth had not been proven to be "substantial." The necessary implication is that those other genuine issue ads must be the subject of as-applied challenges.

E. *McConnell*'s "In the Future" Comment Addressed Substantiality, Not Preclusion.

McConnell's statement that "in the future corporations . . . may finance genuine issue ads . . . by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund," *id.* at 206, must be understood in light of the immediately following reference to *Broadrick* and the conclusion that the alleged overbreadth was not "substantial." *Id.* at 207 (quoting *Broadrick*). In light of that conclusion about substantiality, the immediately preceding discussion had to be addressing substantiality.

Practically, this Court needed quickly to decide whether to sustain the electioneering communication prohibition because elections were rapidly approaching. The *McConnell* district court labored arduously through a voluminous record to establish what percent of genuine issue ads, as opposed to true electioneering speech, would be captured by the electioneering communication prohibition. Judge Leon had found that up to 17% of genuine issue ads, including authentic grass-roots lobbying as presented herein, were swept in by the prohibition. *McConnell*, 251 F. Supp. 2d. at 798-99. The *McConnell* plaintiffs' argument was that 17% was "substantial" so the prohibition must be facially struck down under *Broadrick*.

The *McConnell* district court had a heavy burden in dealing with the enormous record and briefing under a mandated expedited schedule. It took months to sift the mountains of evidence and draft three very different, lengthy opinions and findings and a two-judge memorandum opinion, which activity this Court summarized by noting that eleven cases had been "filed promptly after the statute went into effect in March 2002," that the district court opinion did not issue until "May 1, 2003," and that it "held some parts of BCRA unconstitutional and upheld others." 540 U.S. at 132-33.

This Court noted probable jurisdiction on June 5, 2003, *id.* at 133, and needed to have a decision in place by December 2003 because affected primaries were beginning in early 2004. The Court managed blinding speed under the circumstances, expediting briefing and issuing its decision on December 10, 2003. But the Court simply did not have time to wade through all the evidence to resolve the different findings of fact as to what constituted a "genuine issue ad" and what percentage of genuine issue ads were being swept in by the electioneering communications prohibition. So it relied on *Broadrick* substantial overbreadth analysis, which did not require resolution of the constitutionality of various applications of the prohibition.

Consequently, this Court's comments about "genuine issue ads" "in the future" were necessarily downplaying the substantiality of the 17% figure by (1) noting that "[t]he precise percentage of issue ads" was debated by the parties and the district court judges, (2) declaring that "the vast majority of ads clearly had [an electioneering] purpose," and (3) declaring that "in the future" there would be ways to minimize the percentage of genuine issue ads that were impacted. *Id.* at 206. In fact, the language of the "in the future" sentence appears to have been adapted from a section of the *FEC*'s Supreme Court Brief where the FEC argued that the overbreadth was not substantial enough for facial invalidation.[21]

And immediately after that statement, the Court added footnote 88, acknowledging that the justifications supporting the prohibition against constitutional attack "might not apply to genuine issue ads." The Court then concluded with the language citing *Broadrick*, quoted *supra* at note 4, and stated that "BCRA's application to pure issue ads is [not] substantial." *Id.* at 207. Understanding *Broadrick* facial analysis by its own express terms, this comment about "application to pure issue ads" not being substantial means that the electioneering communication prohibition is upheld against a *facial* challenge and there may be subsequent challenges under *as-applied* facts. *Broadrick*, 413 U.S. at 615-16 (insubstantial "overbreadth" is dealt with "through case-by-case analysis of the fact situations"). *McConnell* did

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[21]The FEC argued that

> The only basis for invalidating the statute on its face for overbreadth would be to conclude that in a substantial number of instances, organizations that seek to air legitimate issue advertisements would be unable to do so without triggering BCRA's definition .... To avoid BCRA, an organization need only refrain from identifying a federal candidate in an issue advertisement or avoid the narrow window before the candidate's election or advertising in the candidate's district. Moreover, . . . the separate segregated fund imposes only minimal . . . burdens .... [Brief for the FEC at 106, *McConnell*, 540 U.S. 93.]

not purport to alter the *Broadrick* facial challenge analysis, but rather relied upon it and so reaffirmed it.

F. *McConnell*'s Footnote 73 Had Nothing to Do With As-Applied Challenges.

The district court relied on *McConnell* footnote 73 for the proposition that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge WRTL propounds before us." App. at 2a. Footnote 73 noted that there were two definitions of "electioneering communication" in BCRA—the primary one that this Court upheld and a backup definition—but that it did not need to reach the backup definition because "we uphold all applications of the primary definition and accordingly have no occasion to discuss the backup definition." 540 U.S. at 190 n.73. The district court misunderstood "all applications" to mean all applications of *the prohibition* of corporate funding of electioneering communications.

But footnote 73's mention of "all applications" had nothing to do with facial versus as-applied challenges. This Court was considering the *definition* of electioneering communication, which had a primary and a backup option. Whichever definition was settled upon (if either) would have various *applications in the statute*, i.e., to disclosure requirements for different entities and in different situations, 2 U.S.C. § 434(f), to disclaimer requirements, 2 U.S.C. § 441d, and to the prohibition on the use of corporate or labor union funds. 2 U.S.C. § 441b. The primary definition was upheld in all *these* "applications."

G. Justice Breyer's Title V Comment for the Court Supports As-Applied Challenges.

As to various *factual* applications in a *facial* substantial overbreadth analysis, this Court would have either upheld BCRA as to *all* applications (subject to later as-applied challenges) or as to none, based on whether the *Broadrick* overbreadth was deemed "substantial." This is what the Court did. 540 U.S. at 207. This would explain what Justice

Breyer was referring to in his discussion for the Court of BCRA's Title V (not Title II) when he parenthetically described the Court's facial upholding of the electioneering communication prohibition as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey message of support or opposition)." *Id.* at 239 (emphasis in original). This comment thus provides no support for an argument against as-applied challenges.

In fact, it expressly does the opposite. By likening *McConnell*'s decision on BCRA § 203 (electioneering communication prohibition) to BCRA § 504 (broadcaster reports), the Court indicated that as-applied challenges remained open because it explicitly said so in responding to Chief Justice Rehnquist's criticism that the Court's opinion on BCRA § 504 ignored the First Amendment rights of candidates and other speakers. 540 U.S. at 243-44. The majority responded that those rights were taken into account by the possibility of as-applied challenges:

> Moreover, candidates (or other speakers) whom § 504 affects adversely in this way (or in other ways) remain free to challenge the lawfulness of FCC implementing regulations and to challenge the constitutionality of § 504 as applied. To find that the speech-related interests of candidates and others may be vindicated in an as-applied challenge is not to "ignor[e]" those interests.

Id. at 244. Based on this assertion, *McConnell* didn't ignore interests in grass-roots lobbying because they may be vindicated in as-applied challenges.

In sum, this Court in *McConnell* did not foreclose as-applied challenges to the prohibition on corporate expenditures for electioneering communications. Nor may all future as-applied challenges be precluded. As noted in the Introduction, *supra*, reason and experience teach that no court can foresee all possible future fact situations that might arise and require the considered constitutional analysis of the federal courts. Precluding all future as-applied chal-

lenges on the basis of wording in the opinion in a facial challenge is unprecedented and without authority.[22]

II. An Exception for Genuine Grass-Roots Lobbying Is Constitutionally Required.

Authentic grass-roots lobbying is inherent in our constitutional system of *representative* government and is so essential to the people's self government that it requires an exception. It is supported by free expression and association rights, considered in *McConnell*, and also by the First Amendment right to petition.

WRTL seeks relief as to (a) its three broadcast ads *and/or* (b) grass-roots lobbying generally, as carefully defined, and, as to either of these options, it seeks to use either general funds or funds contributed to a segregated

[22]The district court also relied on an argument from silence, i.e., the fact that this Court did not expressly grant "permission" for an as-applied challenge. App. at 7a-8a, But federal courts never need permission to consider an as-applied challenge. *See Marbury v. Madison*, 1 Cranch 137 (1803) (power of judicial review). Key cases in the election-law context were as-applied challenges to federal laws that were decided under the federal courts' inherent authority of judicial review without prior judicial permission. *Compare Buckley*, 424 U.S. 1, *with MCFL*, 479 U.S. 238 (1986), *Austin*, 494 U.S. 652, and *McConnell*, 540 U.S. at 206.

Congress itself acknowledged that the electioneering communication prohibition might not be narrowly tailored by authorizing the FEC to create additional exceptions to the electioneering communication definition, with the limitation that communications not promote, support, attack, or oppose a candidate. 2 U.S.C. § 434(f)(3)(B)(iv). Grass-roots lobbying was one of the candidates for an exclusion that the FEC considered, although it decided (erroneously) that it could not create one because "the Commission believe[d] that such communications could be reasonably perceived to promote, support, attack or oppose a candidate in some manner." 67 F. Reg. 652003. As discussed below, the prime sponsors of BCRA argued that the FEC should create a grass-roots lobbying exception under this authority. *Infra* at 27-28. It would be incongruous for a federal agency to have the power to consider exceptions in a rulemaking but for an Article III court not to have that power in a constitutional challenge.

bank account that includes donations from only individuals qualified under 2 U.S.C. § 434(f)(2)(E), *see* App. 19a, i.e., no donations from corporations, labor unions, or foreign nationals.[23] *See* Amended Complaint Count 2. This Court should go beyond the three broadcast ads, derive the constitutional principle, and state a bright-line rule recognizing an exception to the prohibition on corporate electioneering communications for authentic grass-roots lobbying.[24]

McConnell said that the "constitutionally adequate justification" for upholding the electioneering communication prohibition was that the "sham issue ads" considered were the "functional equivalent of express advocacy." 540 U.S. at 206. So the issue here is whether grass-roots lobbying ads equate to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44.

Throughout the *McConnell* litigation, authentic grass-roots lobbying was perceived as different in kind from electioneering. Judge Leon, the controlling vote in the district court, clearly thought that grass-roots lobbying must be excluded from the "sham issue ads" category. He found that grass-roots lobbying did not support or oppose candidates, declaring that his approach to the electioneering communication definition

> assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, genuine issue advocacy, specifically of

[23]Under either approach, the FEC could promulgate regulations before another major election.

[24]This would adhere to the example of *MCFL*, which set out the three factors that were essential to the Court's decision, thus distilling the constitutional principle to a bright-line rule guiding corporations in the future. *MCFL*, 479 U.S. at 263-64.

the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. *See* Findings 368-73 (providing examples of legislation-centered advertisements that do not promote, support, attack, or oppose the election of a federal candidate). [*McConnell*, 251 F. Supp. 2d at 802-03 (Opinion of Judge Leon) (emphasis in original).][25]

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[25]Judge Leon singled out grass-roots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations:

> The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is ... especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293. [*McConnell*, 251 F. Supp. 2d at 794 (emphasis in original).]

Up to 17% of the ads for which the *McConnell* district court did fact finding were "genuine issue ads" (in which Judge Leon included grass-roots lobbying), with possibly more genuine ads in years with more hot-button legislative issues. *Id.* at 798-99.

The *McConnell* majority in this Court made the same distinction between grass-roots lobbying and ads that were the functional equivalent of express advocacy in footnote 88. The note refers to Justice Kennedy's dissent, 540 U.S. at 326-27, where he cited Justice Stevens' *Austin* concurrence, in which Justice Stevens said "there is a vast difference between *lobbying* and debating public issues on the one hand, and political campaigns for election to public office on the other." *Austin*, 494 U.S. at 678 (emphasis added). Justice Kennedy responded that "[t]he distinction, however, between independent expenditures for commenting on issues, on the one hand, and supporting or opposing a candidate, on the other hand, has no significance apart from *Austin*'s arbitrary line." 540 U.S. at 326. Justice Kennedy then asserted that *Austin* was in error, essentially arguing that there is no constitutional line to be drawn between electioneering and genuine issue advocacy. *Id.* at 327. According to Justice Kennedy, corporations and unions should be able to do both without governmental restrictions.

Justice Stevens believed there *was* a principled distinction between "lobbying" and electioneering. *Austin*, 494 U.S. at 678. That debate apparently was what footnote 88 was about. Justices Stevens and O'Connor for the *McConnell* Court insisted that government may regulate electioneering but not lobbying, and Justice Kennedy insisted that government may not prohibit corporations from doing either. Justice Stevens' view prevailed, meaning that *McConnell* held that the government may regulate electioneering but not what footnote 88 called "genuine issue ads."

In the statement of the case, WRTL set out 16 factors that demonstrate that its broadcast ads were authentic grass-roots lobbying, as distinct from "sham" ads. But WRTL also provides a careful definition for the proposed grass-roots lobbying exception that adapts a proposal by Sen. McCain, Sen. Feingold, and the other prime sponsors of BCRA for a grass-roots lobbying exception:

> The term "electioneering communication" does not include any communication that:
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a [specific, pending] legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication contains no reference to any political party.
>
> (B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy. [The criteria in Paragraph (A) are also not met as to a legislative matter if the legislature is not in session.][26]

The definition of Senators McCain and Feingold would have permitted a candidate to be clearly identified (by reference to "your Senator" or "your Congressman"), but not named. However, naming the candidate is necessary, as Judge Leon noted from the *McConnell* record, *supra* at note

[26]The formulation is contained in Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC, Aug. 23, 2002 (hereinafter "McCain-Feingold Comments") (it is on the FEC's website at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf (visited July 26, 2004) along with other comments on the proposed rulemaking for a grass-roots lobbying exception) (bracketed material added).

25, and is easily justifiable based on the people's exercise of their sovereignty in a republic and their right to petition, which includes grass-roots lobbying.

Either the broadcast communications proposed on the facts of this case or the carefully-defined distillation of them into the proposed bright-line rule just set out eliminates the constitutional concerns recognized by this Court as justifying the prohibition. The option of using only funds from a "separate bank account" to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E), would eliminate even more concerns, if necessary. Because WRTL does not challenge the disclaimer and disclosure provisions, there will be no question as to the source and funding of WRTL's ads. There will be no ads resembling express advocacy or the "sham ads" that the Court found to be "functional equivalents." The ads that would be permitted under this definition would be of little or no value for the purposes of opposing/supporting candidates, but they are essential to self government.

What would be excluded by these facts and definition? There could be no ads naming candidates that were not incumbents. There could be no ads about a candidate's past votes, or general voting pattern, or possible vote on legislation that might later be introduced. There could be no ads about a candidate's perceived misconduct toward his wife or intern, or whether taxes were withheld and paid for a nanny decades ago. Candidates could not be branded liberal or right-wing, pro- or anti-gun, pro- or anti-abortion, pro- or anti-environment, pro- or anti-globalism, pro- or anti-education, pro- or anti-gay, or even Democrat, Republican, Libertarian, or independent. Nor could they be scrutinized as to the sufficiency or conduct of their military service. Elections and candidacy could not be mentioned.

This is the narrowly tailored, least restrictive means of eliminating the concerns identified in *McConnell*. Absent constitutional justification, the prohibition may not be applied on the facts of this case. This Court has already

decided that where constitutional justification is absent, the "desire for a bright-line rule" with regard to requiring PAC funding of communications

> hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom. While the *burden on MCFL's speech is not insurmountable*, we cannot permit it to be imposed *without a constitutionally adequate justification*. In so holding, we do not assume a legislative role, but fulfill our judicial duty—to enforce the demands of the Constitution. [*MCFL*, 479 U.S. at 263 (emphasis added).]

In any event, WRTL *has* provided a bright-line test for grass-roots lobbying, *infra*, that is every bit as bright as the exception for *MCFL*-type corporations created by the Supreme Court in *MCFL*. *Id.* at 263-64. The sort of "genuine issue ads" that constitute grass-roots lobbying can be neatly cabined without placing any burden on the courts or the FEC's ability to enforce regulations concerning activities that actually pose a risk to the public good.

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction, reverse the district court, and decide the merits of the claim. Alternatively, the Court should summarily reverse the district court's dismissal and remand this case with instructions to expeditiously decide the already briefed cross-motions for summary judgment.

Respectfully submitted,

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[filed May 10, 2005]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC., Plaintiff,	)	Civil No. 04-1260 (DBS, RWR, RJL)
v.	)	THREE-JUDGE COURT
FEDERAL ELECTION COMMISSION, Defendant.	)	

ORDER

For the reasons set forth in this Court's Memorandum Opinion and Order dated May 9, 2005, it is this 9th day of May, 2005, hereby

ORDERED that the plaintiff's Motion for Summary Judgment [#41] is DENIED as moot; and it is further

ORDERED that the defendant's Motion for Summary Judgment [#43] is DENIED as moot; and it is further

ORDERED that the case is dismissed with prejudice.

SO ORDERED.

/s/ David B. Sentelle
DAVID B. SENTELLE
United States District Judge

/s/ Richard W. Roberts
RICHARD W. ROBERTS
United States District Judge

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

[filed May 10, 2005]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC., Plaintiff,	)	Civil No. 04-1260 (DBS, RWR, RJL)
v.	)	THREE-JUDGE COURT
FEDERAL ELECTION COMMISSION, Defendant.	)	

MEMORANDUM OPINION AND ORDER

In the present action, plaintiff Wisconsin Right to Life, Inc. ("WRTL") seeks a judgment declaring portions of the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), unconstitutional as applied to it under the facts set forth in its complaint. WRTL sought preliminary injunctive relief preventing the defendant, Federal Election Commission ("FEC"), from enforcing the contested portions of BCRA against it.

On August 17, 2004, the Court denied WRTL's motion for preliminary injunctive relief. In denying WRTL's motion, the Court held that "the reasoning of [the Supreme Court in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003)] leaves no room for the kind of 'as-applied' challenge to BCRA asserted by WRTL, even though the *McConnell* Court "was considering a facial challenge . . . ." Mem. Op. at 4. After denying WRTL's motion, the Court ordered the parties to submit supplemental memoranda addressing the issue of whether the case should be dismissed in light of the Court's ruling. The issue now ripe for review, and after due consideration of the parties' supplemental memoranda and the entire record herein, the Court for the reasons set forth

in its prior opinion holds that WRTL's "as-applied" challenge to BCRA is foreclosed by the Supreme Court's decision in *McConnell*. Accordingly, WRTL's case is dismissed with prejudice.

This the 9th day of May, 2005.

/s/ David B. Sentelle
DAVID B. SENTELLE
United States District Judge

/s/ Richard W. Roberts
RICHARD W. ROBERTS
United States District Judge

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

[file mark: August 17, 2004]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
Plaintiff,	)	Civil No. 04-1260 (DBS, RWR, RJL)
v.	)	THREE-JUDGE COURT
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter coming before the court on plaintiff's motion for a preliminary injunction, and the court having considered the affidavits and representations of counsel, solely for the purposes of the motion for a preliminary injunction, the court makes the following findings of fact:

1. Plaintiff Wisconsin Right to Life, Inc. (WRTL) is a nonprofit, nonstock, Wisconsin, ideological advocacy corporation recognized by the Internal Revenue Service as tax-exempt under § 501(c)(4) of the Internal Revenue Code.

2. Defendant Federal Election Commission (FEC) is the government agency charged with enforcing the relevant provisions fo the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA).

3. WRTL admits that it does not qualify for any exception permitting it to pay for electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition and (b) its advertisements are "targeted" so that it does not fit the exception for the § 501(c)(4) organizations

as described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A).

4. U.S. Senator Russell Feingold of Wisconsin is running for reelection this year.

5. As early as September, 2003, candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. (Def.'s Opp'n) Exh. 10-14.

6. WRTL maintains a political action committee (PAC).

7. In March, 2004, WRTL's PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority. Def.'s Opp'n Ex. 4, 5, 6, 7.

8. In a news release on July 14, 2004, WRTL criticized Senator Feingold's record on Senate filibusters against judicial nominees. Def.'s Opp'n Exh. 16.

9. WRTL had used a variety of non-broadcast communications to convey its criticism of Senate filibusters against judicial nominees in the months leading up to August 2004.

10. WRTL is now paying to broadcast on television and radio a series of advertisements inclusive of those depicted in Exhibits A, B, and C to the complaint and attached as Exhibits A, B, and C hereto, all of which refer to and will continue to refer to and clearly identify Senator Russell Feingold.

11. The Wisconsin primary for the office for which Senator Feingold is a candidate will occur thirty days after August 15, 2004. The general election will occur November 2, 2004.

12. WRTL anticipates that its ongoing advertisements will be considered electioneering communication for purposes of federal statutory and regulatory definitions under 1 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29 during the period between August 15, 2004 and November 2, 2004.

LEGAL CONCLUSIONS AND ANALYSIS

Plaintiff Wisconsin Right to Life seeks a judgment declaring portions of the BCRA unconstitutional as applied to it under the facts set forth in its complaint, and it seeks preliminary injunctive relief preventing FEC enforcement of those portions of BCRA against it.

The focus of the litigation is 2 U.S.C. § 441b, which regulates the extent to which such corporations as WRTL may finance and produce "applicable electioneering communications," which are defined at 2 U.S.C. § 434(f)(3) as being "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general . . . election . . . ; or (bb) 30 days before a primary . . . election; and (III) . . . is targeted to the relevant electorate."

In this case, WRTL cites three specific ads, first aired July 26, which contain references to Sen. Russell Feingold, currently the sole Democrat contender for the Senate seat. Complaint 5. As the primary election occurs on September 14 and the general election occurs on November 2, BCRA's (in this case, overlapping) "blackout" periods prohibit the airing of the advertisements from August 15 until November 2. *Id.* at 6.

WRTL's prayer for relief is sweeping, seeking both declaratory and injunctive relief declaring 2 U.S.C. § 4441b unconstitutional as applied to "electioneering communications . . . that constitute grass-roots lobbying," and specifically as applied to the three advertisements incorporated in its complaint. Complaint 13. However, the motion before us today concerns only its motion for a preliminary injunction. The standards for the granting of a preliminary injunction are familiar. To prevail, a plaintiff seeking such relief must demonstrate: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable harm if an injunction is not granted; (3) that an injunction would not cause substantial injury to other parties; and (4) that the public interest would be furthered by the injunction. *See,*

e.g., CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). Plaintiff's showing in the present litigation cannot survive this standard.

First, WRTL has not established that it has a substantial likelihood of success on the merits. Just last year, in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003), the Supreme Court upheld the electioneering communication provisions of the BCRA in their entirety. *Id.* at 686-700. WRTL is correct that in *McConnell* the Court was considering a facial challenge while the current challenge subjects the statute to constitutional analysis in the context of its specific application, but the reasoning of the *McConnell* Court leaves no room for the kind of "as applied" challenge WRTL propounds before us. More specifically, the Court noted that the statute included a "back up" definition of electioneering communications, 2 U.S.C. § 434(f)(3)(A)(I), to take effect only if the primary definition were held to be "constitutionally insufficient." The Court expressly stated that it need not rule on the constitutionality of that back up provision because "*we uphold all applications of the primary definition* and accordingly have no occasion to discuss the backup definition." 124 S. Ct. at 687 n.73 (emphasis added). The Court's deliberate declaration of its ruling as encompassing "*all applications* of the primary definition" suggests little likelihood of success for an "as applied" challenge to some applications of that definition, such as the one plaintiff brings before us.

Furthermore, the Court's deliberate upholding of "all applications" stands in informative contrast to its explicit acknowledgment that other parts of the statute which it upheld against facial challenge might be subject to "as applied" challenges in the future. For example, the Court upheld a Title I provision of BCRA restricting state parties from spending "soft money for federal election activities.: 2 U.S.C. § 441i(b). But the Court stated that "as-applied challenges remain available" if some future state party

could show that the restriction had become "'so radical in effect as to . . . drive the sound of [the recipient's] voice below the level of notice.'" *Id.* at 677 (brackets in the original) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000)). Similarly, in upholding the ban on soft money fundraising by national party committees, 2 U.S.C. § 441i(a), the Court noted that "'a nascent or struggling minor party can bring an as-applied challenge" should the ban prevent it from "amassing the resources necessary for effective advocacy.'" *Id.* at 669 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

Again, in upholding the Title V recordkeeping requirement on broadcasters, the Court noted that the regulated entities "remain free to challenge the provisions, as interpreted by the FCC in regulations, or as otherwise applied." *Id.* at 717. And finally, the Court noted that its ruling upholding against facial challenge the § 201 disclosure provisions of Title II "does not foreclose possible future challenges to particular applications" of that statutory requirement. *Id.* at 692.

While these dicta concerning the possible future facial challenges to other provisions do not preclude the possibility that the Supreme Court might uphold an as-applied challenge to the provisions before us, in the face of the strength of the Court's holding with specific reference to these provisions, we cannot possibly conclude that the plaintiff has made out a substantial likelihood of success on the merits.

Our reading of *McConnell* that as-applied challenges to § 441b are foreclosed is but one reason we find little likelihood of success on the merits. The facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating. *Id.* at 695. In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of

support or opposition" regarding candidates. *Id.* at 651, 697, 715. Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. (See Def.'s Opp. Exh. 4, 16, 18). This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement (Def.'s Opp. Exh. 10-14), and the PAC announcing as a priority "sending Feingold packing." (Def.'s Opp'n Exh. 4.)

As to the second part of the preliminary injunction standard, we hold that plaintiff has not demonstrated that it will suffer irreparable harm in the absence of a preliminary injunction. Plaintiff relies on the general statement that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Unquestionable, as a general proposition of law, that statement is true. However, in adjudicating entitlement of a plaintiff to a preliminary injunction, we must apply the whole four-part test, which requires us to determine whether the "balance of harms favor[s] plaintiffs." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1137 (D.C. Cir. 1988). That said, the actual limitation on plaintiff's freedom of expression, as protected by the First Amendment, is not nearly so great as plaintiff argues. At least for purposes of a preliminary injunction, the present showing appears to be that plaintiff is not precluded from forwarding its message, or even from exposing the public to the particular advertisements at issue. As we understand it, the BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spend-

ing through political action committees (PACs).[1] In *McConnell*, the Supreme Court noted that though "corporations . . . may not use their general treasury funds to finance electioneering communications, . . . they remain free to organize and administer segregated funds, or PACs, for that purpose." *Id.* at 695. The Court went on to reason that "'the PAC option allows corporate political participation without the temptation to use corporate funds for political influence . . . .'" *Id.* (quoting *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200, 2211 (2003)).

The *Beaumont* decision quoted by the Supreme Court in *McConnell*, while not directly on point as it did not deal with the current statute, is instructive. That case involved a challenge to the regulation of a corporation's political contributions while the present involves regulation of electioneering communications. Nonetheless, the analogy is obvious. In *Beaumont*, the Supreme Court endorsed the constitutional adequacy of "the PAC option." That holding by the Supreme Court not only weighs against the likelihood of success on the merits, but it also suggests that plaintiff has not advanced a strong case of irreparable harm in the absence of a preliminary injunction. Certainly, it suggests that the harm established by plaintiff will not weigh much in the balance against potential harm to others under the third step of the test or against the public interest under the fourth. Therefore, WRTL has failed the second as well as the first step of the four-part test.

Given the absence of merit in plaintiff's case on the first element of the preliminary injunction test and the near-total absence of irreparable harm to the plaintiff under the second, we need not linger long over the third and fourth

---

[1]WRTL also has alternative methods available to communicate its message in addition to using PAC funding for broadcast ads, namely, using print media, such as newspaper of magazine advertisements, press releases, pamphlets, informational mailings, and billboards; using electronic communications, such as e-mailing and internet posting; and placing telephone calls.

elements. The harm to the opposing party, the Federal Election Commission, is evident. Everyone agrees that it is the statutory duty of the defendant to enforce the BCRA. If we enter the preliminary injunction, then, to the extent of that injunction, the Commission cannot perform its duty. We hold that an injunction against the performance of the its statutory duty constitutes substantial injury to the Commission, although given plaintiff's failure on the first two elements, we do not consider that showing essential to our denial of the preliminary injunction.

Similarly, since plaintiff has not established any entitlement to preliminary injunction, it is not essential that we determine that the grant of such an injunction would fail to further the public interest, but for the sake of completion of record for the purposes of any review that might be sought, we do hold that plaintiff has not established that the public interest would be furthered by the injunction. The Supreme Court has already determined that the provisions of the BCRA serve compelling government interests. *See McConnell*, 124 S. Ct. at 695-96. To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court in *McConnell*, the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.

In short, plaintiff's case falls far short of the four-part test for the grant of a preliminary injunction. Therefore, we have denied plaintiff's motion. In light of this disposition, we further order that the parties hereto file supplemental memoranda within ten days of the date of this memorandum and order addressing the question of whether this matter should be dismissed.

This the 17th day of August, 2004.

/s/ David B. Sentelle
United States District Judge

/s/ Richard W. Roberts
United States District Judge

/s/ Richard J. Leon
United States District Judge

Radio Script
Client: Wisconsin Right to Life
Title: "Wedding" :60
Job#: WRL-8136
Date: July 15, 2004

AUDIO	TALENT
We hear church bells up and under...	PASTOR: And who gives this woman to be married to this man?
	BRIDE'S FATHER (rambling): Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up...
	VO:
	Sometimes it's just not fair to delay an important decision.
	But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
	BRIDE'S FATHER (rambling): Then you get your joint compound and your joint tape and put the tape up over...
	Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
	Visit: BeFair.org. That's BeFair.org
	Paid for by Wisconsin Right to Life

(befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Exhibit

A

Radio Script
Client: Wisconsin Right to Life
Title: "Loan":60
Job#: WRL-8136
Date: July 14, 2004

AUDIO	TALENT
	LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and, well...
	COUPLE: Yes, yes... we're listening.
	OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River in Waupaca...
	VO: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
	Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
	Visit: BeFair.org
	Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Exhibit
B

TV Script
Client: Wisconsin Right to Life
Title: "Waiting":30
Job#: WRL-8136
Date: July 14, 2004

VIDEO	AUDIO
We see vignettes of a middle-aged man being as productive as possible while his professional life is in limbo:	
He reads the morning paper He polishes his shoes He checks for mail, which hasn't arrived He scans through his Rolodex He reads his Palm Pilot manual He pays bills	VO: There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of U.S. Senators is filibustering—blocking qualified nominees from a simple "yes" or "no" vote . It's politics at work and it's causing gridlock.
SUPER: www.BeFair.org	Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
4-SECOND DISCLAIMER (4% or 20 scan lines): Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising, not authorized by any candidate or candidate's committee.	Visit: BeFair.org WRL REPRESENTATIVE VO: Wisconsin Right to Life is responsible for the content of this advertising.

Exhibit
C

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2 U.S.C. § 434(f)(1)-(3)

§ 434. Reports

* * *

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication.* For purposes of this subsection—

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the

candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate

(consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

2 U.S.C. § 441b(a)-(b)(2)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution

prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79l(h)), the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 301 (2 U.S.C. § 431), and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and

solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

BCRA § 403(a) & (d), 116 Stat. at 113-14

SEC. 403. JUDICIAL REVIEW

(a) SPECIAL RULES FOR ACTIONS BROUGHT ON CONSTITUTIONAL GROUNDS.—If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

* * *

(d) APPLICABILITY.—

(1) INITIAL CLAIMS.—With respect to any action initially filed on or before December 31, 2006, the provisions of subsection (a) shall apply with respect to

each action described in such section.

(2) SUBSEQUENT ACTIONS.—With respect to any action initially filed after December 31, 2006, the provision of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action.

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section—

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons—

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a

complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) Can be received by 50,000 or more persons means—

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an

FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour—

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a

broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that—

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) Electioneering communication does not include any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial

distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

11 C.F.R. § 114.2(a)-(b)

§ 114.2 Prohibitions on contributions and expenditures.

(a) National banks and corporations organized by authority of any law of Congress are prohibited from making a contribution, as defined in 11 CFR 114.1(a), in connection with any election to any political office, including local, State and Federal offices, or in connection with any primary election or political convention or caucus held to select candidates for any political office, including any local,

State or Federal office. National banks and corporations organized by authority of any law of Congress are prohibited form making expenditures as defined in 11 FR 114.1(a) for communications to those outside the restricted class expressly advocating the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party, with respect to an election to any political office, including any local, State or Federal office.

(1) Such national banks and corporations may engage in the activities permitted by 11 CFR part 114, except to the extent that such activity is foreclosed by provisions of law other than the Act.

(2) The provisions of 11 CFR part 114 apply to the activities of a national bank, or a corporation organized by any law of Congress, in connection with local, State and Federal elections.

(b)(1) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR part 100, subpart B. Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election.

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D;

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; or

(iii) Making payments for an electioneering communication to those outside the restricted class. However, this paragraph (b)(2)(iii) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

(A) The committee is not a political committee as

defined in 11 CFR 100.5;

(B) The committee incorporated for liability purposes only;

(C) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and

(D) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

11 C.F.R. § 114.14

§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds disbursed by a corporation

or labor organization, or received by a person, that constitute --

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements, including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d)(1) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

(2) Any person who wishes to pay for electioneering communications may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104. Use of funds exclusively from such an account to pay for an electioneering communications shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for an electioneering communication shall be required to only report the names and addresses of those individuals who donated or otherwise provided an amount aggregating $ 1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

[filed: May 12, 2005]

United States District Court
District of Columbia

Wisconsin Right to Life, Inc. ***Plaintiff,***	
v.	**Civil No. 04-1260 (DBS, RWR, RJL)**
Federal Election Commission, ***Defendant.***	THREE-JUDGE COURT

Notice of Appeal of Dismissal to U.S. Supreme Court

Plaintiff Wisconsin Right to Life, Inc. ("WRTL") hereby gives notice that it appeals to the United States Supreme Court from this Court's *Memorandum Opinion and Order* (Docket #48, dated May 9, filed May 10, 2005) and *Order Dismissing Case With Prejudice* (Docket #49, dated May 9, filed May 10, 2005), which dismiss WRTL's complaint with prejudice.

Appeal is taken pursuant to 28 U.S.C. § 1253 (providing for direct appeal to the Supreme Court from decisions of three-judge courts denying a permanent injunction) and Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 114 (Public Law 107-155) (providing for direct appeal to the Supreme Court of the "final decision" of this District Court).

Respectfully submitted,

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No. 01-1581

In the Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court correctly dismissed appellant's as-applied constitutional challenge to the federal prohibition on the use of corporate treasury funds to finance "electioneering communications."

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In the Supreme Court of the United States

No. 04-1581

WISCONSIN RIGHT TO LIFE, INC., APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

OPINIONS BELOW

The opinion and order of the district court dismissing appellant's complaint (J.S. App. 1a-3a) is unreported. A prior opinion of the district court denying appellant's request for preliminary injunctive relief (J.S. App. 4a-12a) is unreported.

JURISDICTION

The judgment of the district court was entered on May 10, 2005. A notice of appeal was filed on May 12, 2005, and was docketed on May 25, 2005. The jurisdictional statement was filed on May 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATEMENT

This case concerns a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 203, 116 Stat. 91-92, that prohibits corporations from using their general treasury funds to pay for any communication—called an "electioneering communication"—that refers to a candidate for federal office and is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 2 U.S.C. 441b(b)(2) (2000 & Supp. II 2002). This Court recently sustained BCRA § 203 against a facial constitutional challenge, holding that the provision is neither overbroad nor underinclusive. *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003). Appellant subsequently filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to appellant's own broadcast advertisements. The three-judge district court denied appellant's request for preliminary injunctive relief, J.S. App. 4a-12a, and subsequently dismissed appellant's complaint, *id.* at 1a-3a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431-455 (2000 & Supp. II 2002), and other federal campaign-finance statutes. See J.S. App. 4a. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8); 2 U.S.C. 438(a)(8) (Supp. II 2002) and (d);

and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and non-profit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a "political action committee" or "PAC," to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. II 2002). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation " 'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to federal candidates or used to pay for independent expenditures to communicate to the general public the corporation's views on candidates for federal office.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on using corporate treasury

funds to finance independent expenditures for speech could not constitutionally be applied to a corporation that (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210 ("Our decision in *MCFL* related to a carefully defined category of entities."); 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. 479 U.S. at 248-249; see 2 U.S.C. 431(17) (2000) (pre-BCRA version). The Court had introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52. "[T]hose examples eventually gave rise to what [became] known as the 'magic words' requirement," *McConnell*, 540 U.S. at 191, under which communications not using such terms were

frequently held not to be covered by federal restrictions on corporate election-related expenditures.

b. Based on its assessment of evolving federal campaign practices, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. Corporations and labor unions crafted political communications that avoided explicit words of electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[A]lthough the resulting advertisements [did] not urge the viewer to vote for or against a candidate in so many words, they [were] no less clearly intended to influence the election." *Id.* at 193. "Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (2000 & Supp. II 2002). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general

election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88, (2 U.S.C. 434(f)(3)(A)(i)(III) (Supp. II 2002)).[1] That prohibition does not apply to "*MCFL* organizations." See *McConnell*, 540 U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications from that fund. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. II 2002).

3. In *McConnell*, this Court upheld the provision at issue in this case against constitutional challenge. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 162, and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990)). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Ibid.* (quoting *Beaumont*, 539 U.S. at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted). The Court concluded that the compelling governmental interests that support requiring corporations to finance express advocacy from a PAC apply equally to their financing of electioneering communications. *Id.* at 206.

[1] BCRA excludes from that definition (i) a news story, commentary, or editorial by a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), (2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. II 2002)). The definition also does not encompass corporate- or union-financed print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207.

The Court held that the constitutional inquiry did not turn on the "precise percentage of [past] issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose." *McConnell*, 540 U.S. at 206. The Court stated that "the vast majority of ads" run during the 30- and 60-day intervals between federal primary and general elections "clearly had such a purpose." *Ibid.* The Court found it decisive, however, that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. Appellant Wisconsin Right To Life, Inc., is a nonprofit, nonstock Wisconsin corporation. Appellant's amended complaint asserted that the corporation is tax-exempt under Section 501(c)(4) of the Internal Revenue Code, and that it was organized to protect "individual human life from the time of fertilization until natural death." Amended Compl. paras. 20, 22; see J.S. App. 4a. Appellant asserted that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation"

under 11 C.F.R. 114.10, which implements the *MCFL* exception. See J.S. App. 4a. Appellant administers its own separate segregated fund for campaign-related activity. See *id.* at 5a.

United States Senator Russell Feingold of Wisconsin, a Democrat, ran for reelection in 2004. J.S. App. 5a. "In March 2004, [appellant's] PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." *Ibid.* "In a news release on July 14, 2004, [appellant] criticized Senator Feingold's record on Senate filibusters against judicial nominees." *Ibid.* On July 26, 2004, appellant began to use its corporate funds to finance the airing of three broadcast advertisements critical of the filibusters that identified Senator Feingold by name. *Id.* at 6a, 13a-17a.

5. On July 28, 2004, appellant filed suit against the FEC in federal district court, alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communications" as defined in the Act is unconstitutional as applied to appellant's advertising disbursements. J.S. App. 6a. Appellant sought a preliminary injunction barring enforcement of the statute against it. *Ibid.* Appellant "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions * * * during the period between August 15, 2004 and November 2, 2004." *Id.* at 5a. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114.

The district court denied appellant's request for a preliminary injunction. J.S. App. 4a-12a. In holding that appellant had not established a substantial likelihood of success on the merits, the district court ex-

plained that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds before us." *Id.* at 7a. The district court observed that this Court in *McConnell* had expressly declined to address the "backup definition" of "electioneering communication" set forth in 2 U.S.C. 434(f)(3)(A)(i)(I) (Supp. II 2002) because the Court had upheld "*all applications of the primary definition.*" J.S. App. 7a (quoting *McConnell*, 540 U.S. at 190 n.73). The district court also noted that, in contrast to *McConnell*'s discussion of BCRA § 203, the Court had explicitly acknowledged that *other* challenged parts of BCRA might be subject to future as-applied challenges. J.S. App. 7a-8a.

The district court further explained that its "reading of *McConnell* that as-applied challenges to [2 U.S.C.] § 441b are foreclosed is but one reason [the court] f[ou]nd little likelihood of success on the merits." J.S. App. 8a. In addition, the court found that the specific facts of this case "suggest that [appellant's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Ibid.* The district court explained:

> In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of support or opposition" regarding candidates. Here, [appellant] and [appellant's] PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did [appellant] switch to broadcast media. This followed the PAC endorsing

> opponents seeking to unseat a candidate whom [appellant] names in its broadcast advertisements, and the PAC announcing as a priority "sending Feingold packing."

Id. at 8a-9a (citations omitted).

The district court subsequently dismissed appellant's complaint in an unpublished memorandum opinion and order. J.S. App. 1a-3a. The court held, "for the reasons set forth in [the preliminary-injunction] opinion," that appellant's as-applied challenge was "foreclosed by [this] Court's decision in *McConnell*." *Id.* at 2a-3a.

ARGUMENT

Appellant contends that BCRA § 203's ban on the use of corporate treasury funds to finance "electioneering communications" is unconstitutional as applied to the advertisements aired by appellant in July 2004, and to "grass-roots lobbying communications generally." See J.S. i. Because appellant's constitutional challenge is squarely foreclosed by this Court's decision in *McConnell*, the appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

1. As the district court explained in denying appellant's request for preliminary injunctive relief, the "reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds" here. J.S. App. 7a. Contrary to appellant's contention (J.S. 12), this Court in *McConnell* did not "brush[] aside concerns about 'genuine issue ads.'" Rather, the Court directly confronted the contention that BCRA § 203 is unconstitutional because of its potential to burden issue advertisements that are not intended to influence federal elections. While acknowledging that BCRA § 203

might encompass some such advertisements, the Court squarely held that the provision is constitutional in *all* its applications. In reaching that conclusion, the Court recognized that BCRA § 203 imposes only a modest burden on speakers who wish to discuss issues of public concern but do not intend to influence federal elections, and that the establishment of an objective bright-line rule was essential to the achievement of Congress's objectives.

a. This Court's opinion in *McConnell* states in three different places that BCRA § 203's restrictions on the funding of "electioneering communications" are constitutional in *all* of their applications. First, the Court noted that BCRA contains two alternative definitions of the term "electioneering communication": a primary definition (which is the subject of appellant's challenge in this case), and a "backup" definition that would take effect if the primary definition were held to be unconstitutional. *McConnell*, 540 U.S. at 190 n.73 (citing 2 U.S.C. 434(f)(3)(A)(ii) (Supp. II 2002)). The Court stated that, because it had upheld "all applications of the primary definition" against the plaintiffs' constitutional challenge, the Court "accordingly ha[d] no occasion to discuss the backup definition." *Ibid.*

Later in its opinion, the Court summarized its treatment of BCRA § 203. The Court described its analysis of that provision as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey [a] message of support or opposition." *McConnell*, 540 U.S. at 239. Finally, in addressing the plaintiffs' claim that the electioneering-communication provision is overbroad, the Court expressly held that BCRA's financing restrictions are constitutional even as applied to "genuine issue

ads." In rejecting the plaintiffs' overbreadth challenge, the Court explained:

> This argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect. The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. Nevertheless, the vast majority of ads clearly had such a purpose. *Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.*

Id. at 206 (emphasis added; citations omitted).

Appellant's understanding of *McConnell* as permitting appellant's as-applied constitutional challenge is inconsistent not only with the three passages discussed above, but with the broader context of the Court's decision. The parties to that case recognized that BCRA's primary definition of "electioneering communication" encompasses at least some advertisements that are not intended to influence federal elections, while disagreeing about the constitutional significance of that fact.

The plaintiffs contended that such advertisements comprise a sufficiently large percentage of the total communications covered by BCRA § 203 as to render the provision unconstitutional on its face. See, *e.g.*, Br. for Senator Mitch McConnell, et al. at 49-57, *McConnell* v. *FEC*, *supra*, (No. 02-1674, et al). The statute's defenders, by contrast, argued that the plaintiffs' overbreadth challenge should be rejected because "BCRA's primary definition of 'electioneering communications' is narrowly tailored to advance several different compelling government interests," Br. for Federal Election Commission, et al. at 105, *McConnell* v. *FEC*, *supra* (No. 02-1674, et al.), and because the "electioneering communication" provisions impose only minimal burdens on the corporate and union advertisers to which those provisions apply, *id.* at 106. This Court's categorical rejection of the plaintiffs' overbreadth challenge, unaccompanied by any suggestion that the acknowledged prophylactic scope of BCRA's "electioneering communication" provisions could provide the basis for a subsequent as-applied constitutional attack, precludes appellant's current claim that its advertisements are immune from federal regulation because they fall outside the heartland of Congress's concern.[2]

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[2] The government's brief in *McConnell* argued that, "[t]o the extent that the definition [of 'electioneering communication'] is not *perfectly* tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis." Br. for Federal Election Commission, et al. at 105-106, *McConnell* v. *FEC*, *supra* (No. 02-1674, et al.). The principal thrust of the government's argument regarding the "electioneering communication" provisions, however, was that BCRA's primary definition of that term is valid because of the importance of the government interests served by those provisions and the minimal nature of the burdens they impose. See generally *id.* at 103-112. In any event, the Court's opinion in *McConnell*

There is consequently no basis for appellant's contention (J.S. 17) that the Court in *McConnell* "acknowledge[d] that *some* issue ads may not constitutionally be regulated" by Congress. The Court did recognize that at least some prior advertisements falling within BCRA § 201(a)'s definition of "electioneering communication" were not actually intended to influence federal elections. Far from suggesting that BCRA's financing restrictions were unconstitutional as applied to such advertisements, however, the Court stated that corporate and union speakers could comply with the law "by simply avoiding any specific reference to federal candidates" or "by paying for the ad from a segregated fund." 540 U.S. at 206. The Court's description of the legal alternatives open to future corporate advertisers is wholly inconsistent with appellant's current contention that, so long as it does not intend to influence federal elections, it is constitutionally entitled to use general treasury funds to finance advertisements falling within BCRA's definition of "electioneering communication."

2. Recognition of an as-applied constitutional challenge along the lines suggested by appellant would substantially undermine Congress's effort to develop an objective bright-line rule for identifying the election-related advertisements that may not be financed with corporate and union treasury funds. This Court in *Buckley* introduced the "express advocacy" test in order to ensure that earlier FECA provisions—including a provision that limited disbursements "for the purpose of

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did not identify future as-applied challenges as a possible means of addressing the acknowledged (and unavoidable) inclusions in the statutory definition of the communications outside the heartland of Congress' concerns.

* * * influencing" a federal election—were not intolerably vague. See *Buckley*, 424 U.S. at 43-44, 77-80. Based on subsequent experience under the campaign-finance laws, however, Congress concluded, and the evidentiary record in *McConnell* amply demonstrated, that "*Buckley*'s magic-words requirement" had become "functionally meaningless." *McConnell*, 540 U.S. at 193. That was so, the Court in *McConnell* explained, both because advertisers can "easily evade the line by eschewing the use of magic words," and because advertisers employing modern persuasive techniques "would seldom choose to use such words even if permitted." *Ibid.*; see *id.* at 127 & n.18, 193 n.77.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 201(a)'s definition of the term "electioneering communication" is "both easily understood and objectively determinable." *Ibid.* The criteria specified in BCRA § 201(a) correlate closely, though not perfectly, with intent to influence federal elections. See *id.* at 206 (Court finds that the "vast majority" of prior advertisements encompassed by the definition "clearly" had an "electioneering purpose"). BCRA §§ 201(a) and 203 thus prevent wholesale evasion of pre-existing restrictions on corporate and union campaign-related spending, while "rais[ing] none of the vagueness concerns that drove [the Court's] analysis in *Buckley*." *Id.* at 194.

Appellant's approach would reintroduce the indeterminacy that Congress and this Court have sought to dispel. Appellant identifies 16 separate factors that purportedly "indicate that [its] broadcast ads are authentic grass-roots lobbying and not electioneering." J.S. 5; see J.S. 5-6. Appellant does not make clear whether it views all 16 factors as necessary to establish entitlement to a

constitutional exemption, or whether a smaller subset of those factors would suffice. Nor does appellant identify any principled reason that another litigant would be precluded from relying on additional factors suggesting that a particular advertisement was not intended to influence federal elections and/or would not have that effect. If appellant's approach were adopted, the permissibility of corporate and union disbursements would turn on the same sort of unstructured inquiry that the Court in *Buckley* found constitutionally problematic, and that Congress in enacting BCRA carefully sought to avoid.[3]

In addressing constitutional challenges to other FECA provisions, this Court has recognized the value of bright-line rules in preventing evasion of the statute's anti-corruption purposes and in furnishing clear guidance to regulated entities. In *Buckley*, for example, the Court "assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court

[3] The Court in *MCFL* held that the pre-BCRA prohibition on the use of corporate treasury funds for campaign-related expenditures cannot constitutionally be applied to a narrow class of corporations having specified characteristics. See pp. 3-4, *supra*; see also *McConnell*, 540 U.S. at 209-211 (construing BCRA to incorporate the prior exemption for *MCFL* organizations). Appellant stated in its complaint, however, that it does not qualify for that exemption. See J.S. App. 4a. The exemption recognized in *MCFL* turns on an objective and readily administrable assessment of the organization's structure and overall activities, and can be understood as a means of identifying a subset of corporations for which a separate segregated fund for campaign-related expenditures would be unduly burdensome. Respondent's proposal for as-applied constitutional challenges, by contrast, would enmesh the courts in formless inquiries into the purposes of individual disbursements and the content of specific communications.

held, however, that the difficulty of isolating suspect contributions and Congress's interest in guarding against the inherent appearance of abuse justified uniform application of the $1000 individual contribution limit. *Id.* at 29-30. The Court's analysis clearly foreclosed future as-applied challenges to the contribution limits brought by well-intentioned donors who might seek to prove that their own contributions, though in excess of the statutory caps, would be made without any intent to receive special influence in return.[4] Where, as here, recognition of a particular class of as-applied challenges to a bright-line rule would undermine Congress's interest in clarity and predictability, there is nothing anomalous or unprecedented about foreclosing such challenges.

3. Appellant contends (J.S. 24-27) that the district court's refusal to entertain its as-applied challenge to BCRA § 203 is inconsistent with this Court's recognition, in *McConnell* and prior decisions, of a constitutional distinction between regulation of "lobbying" and regulation of "electioneering." That argument reflects a misunderstanding of the rationale for Congress's adoption of an objective bright-line rule.

The Court in *McConnell* reaffirmed the proposition, previously established in such cases as *First National*

[4] See *Goland* v. *United States*, 903 F.2d 1247, 1258-1259 (9th Cir. 1990) (contributions are subject to FECA limits even if a contributor keeps his identity a secret by using straw donors, thereby allegedly precluding the opportunity to exert undue influence); cf. *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640, 654 (1981) ("any such exemption [from a rule limiting certain solicitation activities to physical locations] cannot be meaningfully limited to [the plaintiff], and as applied to similarly situated groups would prevent the State from furthering its important concern").

Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978), that "unusually important interests underlie the regulation of corporations' campaign-related speech." 540 U.S. at 206 n.88. Appellant is therefore correct that any federal interest in regulating corporate issue advocacy *as such* is of considerably less magnitude than is the interest in regulating corporate *campaign* spending. But neither Congress's adoption of a bright-line rule, nor the district court's refusal to entertain appellant's as-applied constitutional challenge, reflects the view that regulation of corporate issue advocacy is desirable for its own sake. Rather, any restrictions that BCRA imposes on the financing of advertisements that in fact have no electioneering purpose are simply the incidental byproduct of Congress's efforts to prevent corporate treasury funds from being used to influence federal elections. Recognizing the strength of the federal interest in preventing actual or apparent electoral corruption, the need for clarity as to the range of communications subject to the financing restrictions, the futility of prior efforts to identify all relevant election-related communications through the "express advocacy" test, and the minor burden that BCRA § 203 places upon corporate and union speakers that wish to engage in issue advocacy but do not seek to influence electoral outcomes, the Court in *McConnell* sustained that provision against constitutional attack. See pp. 11-14, *supra*. Thus, even if the Court were to conclude that Congress lacks a substantial *independent* interest in regulating corporate issue advocacy, the marginal impact of BCRA § 203 on such communications would not render the provision unconstitutional, either on its face or as applied.

4. As the district court indicated in denying preliminary injunctive relief, appellant would have little likelihood of establishing its entitlement to an exemption from BCRA § 203 even if an as-applied constitutional challenge were consistent with the Court's decision in *McConnell*. See J.S. App. 8a ("The facts suggest that [appellant's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating."). Appellant's PAC had previously endorsed the opponents of the candidate named in its broadcast advertisements about the filibuster of judicial nominees (Senator Feingold), and the PAC had announced that "sending Feingold packing" was one of the organization's priorities. *Id.* at 9a. While appellant's advertisements may well have been intended in part to affect congressional activity, the circumstances suggest that the communications were also intended to further the organization's stated objective of defeating Senator Feingold.[5]

Although the three advertisements that were the subject of appellant's original complaint can now be broadcast in Wisconsin without regard to BCRA § 203 until the next Senate election is imminent, appellant has provided no evidence that it has run such advertisements after last November's elections or that it has specific plans to do so, notwithstanding the fact that the issue discussed in the advertisements (Senate filibusters of judicial nominees) was a focus of particularly intense

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[5] The fact that appellant's advertisements included discussion of an issue before the Senate does not control the constitutional analysis. Most electoral advertisements discuss issues of public importance, and "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42.

public interest during the spring of 2005 and remains a topic of widespread public concern. Before this Court, appellant states only that it "intends to do similar grassroots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period." J.S. 7. That chain of events is similar to the pattern that preceded and prompted Congress's passage of BCRA, see *McConnell*, 540 U.S. at 127 ("[T]he conclusion that [purported issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."), and it reinforces the inference that appellant's advertisements were in the heartland of Congress's concern.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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JULY 2005

, 2005
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(3)

No. 04-1581

In The

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., *Appellant,*

v.

FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

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Argument

The case presents two substantial issues, and neither summary dismissal nor affirmance is appropriate.

I. Whether *McConnell* Precluded All As-Applied Challenges Is a Substantial Question.

The Federal Election Commission insists on having the exclusive right to consider and award or withhold as-applied exceptions to the electioneering communications prohibition. Although the FEC may consider as-applied challenges (by rulemaking and advisory opinions), it insists that an Article III court may not. And it insists that this incongruity raises no substantial question.

The FEC has authority to create additional exceptions, *as applied* to specific situations, to the electioneering communications prohibition by rulemaking. 2 U.S.C. § 434(f)(3)(B)(iv). It exercised that authority as applied to *MCFL*-type corporations, 67 Fed. Reg. 65203-07, 65211, over a year before this Court also decided that an exception was required as applied to the type of nonprofits identified in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 264 (1986) ("*MCFL*"). *McConnell v. FEC*, 540 U.S. 93, 209-11 (2003).

The FEC even considered an exception *as applied* to grass-roots lobbying, but decided erroneously that its authorizing statute prohibited the exception. *See Jurisdictional Statement* ("J.S.") at 24 n.22. But BCRA prime sponsors Sen. McCain et al. thought that the FEC had the authority to make such an exception, and that an as-applied exception was appropriate, and that the sponsors' proposed rule formulation was the correct one. *See* J.S. at 24 n.22, 28 & n.26.

And the FEC made an *as-applied* exception when it said that candidate Russ Darrow's name could be used in what were otherwise electioneering communications by the automobile dealerships bearing his name. FEC Advisory Opinion 2004-31; *See* J.S. at 2.

But the FEC says that an Article III court may not do the same. The FEC failed to explain such incongruity. And the FEC's current insistence is built upon its prior insistence in *McConnell* that as-applied challenges were the cure for perceived overbreadth. *See* J.S. at 11-12. Now it asserts the diametrically opposed position that the opportunity for such challenges is over, never to return, and the FEC has exclusive jurisdiction over as-applied questions. The FEC can't have it both ways.

The FEC failed to respond to the argument that Article III prohibits such claim preclusion. *See* J.S. at 8-9. Or to the argument that this Court's Article III and prudential tenets preclude such preclusion. *See* J.S. at 8-11. Or to the argument that *McConnell* reaffirmed such tenets. *See* J.S. at 9-11. Or to the argument that *McConnell*'s reliance on *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), for its substantial overbreadth analysis necessarily embraced *Broadrick*'s pronouncement that where a facial challenge fails the remaining overbreadth is cured by as-applied analysis. *See* J.S. at 8-9. So what did the FEC rely upon? It is summed up in the following passage:

> While acknowledging that BCRA § 203 might encompass some such advertisements ["that are not intended to influence federal elections"], the Court squarely held that the provision is constitutional in *all* its applications. . . . [T]he Court recognized that BCRA § 203 imposes only a modest burden . . . and [a] bright-line rule was essential . . . . [*Motion* at 11 (italics in original).][1]

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[1]The FEC conceded in its *Motion* that it argued in *McConnell* that lack of narrow tailoring "could be addressed on an as-applied basis." *Motion* at 13 n.2. But it tried to dodge this by arguing that "[t]he principal thrust . . . was . . . the importance of the governmental interests . . . and the minimal nature of the burdens . . . ." *Id.* These arguments are not persuasive, as shall be shown, but they also have nothing to do with the necessity of as-applied challenges.

These three assertions are dealt with under these headings: (1) "all its applications," (2) "modest burden," (3) "bright-line rule."

"All its applications." The FEC continues to argue that *McConnell* footnote 73's "all applications" comment refers to all future as-applied challenges to the electioneering communication prohibition instead of all applications of the definition in the statute and fails to respond to the plain-sense explanation of this footnote already made. *See* J.S. at 22. The FEC also argues that the Court's cross reference in a discussion of another BCRA provision (Title V, not Title II), *McConnell*, 540 U.S. at 239, supports its assertion that all future as-applied challenges are precluded, failing to respond to Appellant's plain-sense explanation of this passage. *See* J.S. at 22-24. Finally, the FEC continues to urge that *McConnell*'s "in the future" statement, *id.* at 206, means that all as-applied challenges are barred, again failing to come to grips with the plain explanation of this passage as addressing the substantiality immediately at issue in its *Broadrick* overbreadth analysis. *See* J.S. at 19-22.

Of course, this appeal provides this Court the opportunity to say definitively what it meant by these passages, but the FEC has not made its case that these passages preclude all as-applied challenges, in all situations, by all parties, for all time. And the explanations in the *Jurisdictional Statement* clearly demonstrate not only that these three *McConnell* passages are explainable in other ways but that the text, reason, and precedent compel a different reading.

In support of its all-applications-upheld argument, the FEC next attempted to appeal to the "broader context of the Court's decision." *Motion* at 12. Here the FEC conceded that the *McConnell* "parties," including the FEC, "recognized that BCRA's primary definition of 'electioneering communication' encompasses at least some advertisements that are not intended to influence federal elections." *Motion* at 12. The FEC asserted that the *McConnell* plaintiffs dealt with

the conceded overbreadth by arguing that it was "a sufficiently large percentage" that the statute must be struck facially, but that the "[t]he statute's defenders . . . argued that plaintiffs' overbreadth challenge should be rejected because 'BCRA's primary definition of "electioneering communications" is narrowly tailored to advance several different compelling government interests . . . and . . . impose[s] only minimal burdens . . . .'" *Motion* at 13.

The FEC fails to understand the difference between facial substantial overbreadth analysis (as employed in *Broadrick*, 413 U.S. 601) and strict scrutiny narrow-tailoring analysis. The *Jurisdictional Statement* dealt at length with (a) the difference between substantial-overbreadth facial analysis and narrow tailoring, (b) how the *McConnell* parties argued both substantial overbreadth and narrow tailoring, and (c) this Court's employment of *Broadrick*-style analysis to decide the *McConnell* facial challenge, J.S. at 11-22, which needs no repetition. So the FEC's assertion that "[t]his Court's categorical rejection of the plaintiff's overbreadth challenge . . . precludes appellants's current [as-applied challenge]," *Motion* at 13, is flatly wrong. *Broadrick* said plainly that if an overbreadth facial invalidation of a statute is denied then "whatever overbreadth may exist should be cured through *case-by-case* analysis . . . ." 413 U.S. at 615-16 (1973) (emphasis added).[2]

On the basis of its flawed understanding and argument, the FEC asserts that "[t]here is consequently no basis for appellant's contention that . . . *McConnell* 'acknowledge[d] that *some* issue ads may not be constitutionally regulated' by Congress." *Motion* at 14. Appellant's statement followed its argument that this Court's use of *Broadrick*-style facial overbreadth analysis necessarily left open case-by-case analysis for those ads that *McConnell* indicated were not

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[2]The FEC also argued that this Court did not give permission for this as-applied challenge in *McConnell*, *Motion* at 13, but this argument has already been addressed by unrebutted counter argument. J.S. at 24 n.22.

included in "the vast majority" of "electioneering communications." *See* J.S. at 11-17 Prohibition of this "vast majority" was justified because the communications were the "functional equivalent[s] of express advocacy." 540 U.S. at 206. If the "vast majority" was so justified, then the Court had plainly said that the minority was not so justified. This means that this minority may be the subject of as-applied challenges. The Court said this expressly: "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." 540 U.S. at 206 & n.88. *See* J.S. at 17-22. The FEC's reliance on this Court's statement that "in the future" the electioneering communication prohibition could be avoided or "in doubtful cases" funded with PAC money has been answered at length in the *Jurisdictional Statement*. *See* J.S. 18 & n.20, 19-22. The FEC made no effort to respond to these arguments.[3] This leaves case-by-case analysis as the solution for the lack of narrow tailoring recognized but not dealt with in *McConnell*.

"Modest Burden." The FEC concedes that corporations may engage in lobbying, but argues that the electioneering communication prohibition and dismissal of this case do not "reflect[] the view that regulation of corporate issue advocacy is desirable for its own sake." *Motion* at 17-18. According to the FEC, the burden on lobbying is just an "incidental byproduct" of the prohibition, imposing only a "marginal impact." *Id.* at 18. But if mere "compelled *disclosure*, in itself, can *seriously* infringe on privacy of association and belief guaranteed by the First Amendment," *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (emphasis added), then a fortiori a *prohibition* is a serious burden. What this Court said of the requirement that independent expenditures be made through a PAC, in another as-applied case, applies here: "While the burden on MCFL's speech is not insur-

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[3]The FEC failed to address the clear distinction between "sham ads" and genuine issue ads described in *McConnell*, and the significance of that distinction for the present case. *See* J.S. at 16 & n.18.

mountable, we cannot permit it to be imposed without a constitutionally adequate justification." *MCFL*, 479 U.S. at 263. On the facts of this case, Appellant did not have PAC money enough to do the desired communications and raising sufficient PAC funds, if it had been possible, would have taken too long, J.S. at 6-7, so the prohibition in fact halted the ads that had been running. J.S. at 5. That is a serious burden. But more to the present point, a "modest burden" argument says nothing to whether as-applied challenges are allowed, and it says nothing to this case, which alleges that the burden isn't modest as applied.

"Bright-Line Rule." The FEC argues that permitting as-applied challenges would "undermine Congress's effort to develop an objective bright-line rule," *Motion* at 14, but it fails to respond to the answers already given, *see* J.S. at 30, which are (1) *MCFL*'s holding that the "desire for a bright line rule hardly constitutes the compelling state . . . necessary to justify any infringement on First Amendment freedom," 479 U.S. at 263, and (2) that a very bright line is proposed in this case, J.S. at 28, 30, one that is as bright as the *MCFL*-type corporation line established by this Court. *Id.* at 263-64.[4]

The FEC tries to take the Court's eyes off the proposed bright line, J.S. at 28, by pointing to the sixteen factors, J.S.

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[4]The FEC alleges that the *MCFL*-type corporation rule is a bright line while the proposed rule herein "would enmesh the courts in formless inquiries into the purposes of individual disbursements and the content of specific communications." *Motion* at 16 n.3. There has, of course, been litigation over the scope of the *MCFL* exception, *see, e.g., Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994), so fact-sensitive constitutional analysis is appropriate even with an admittedly bright line. The FEC's assertion is clearly based on its attempt (discussed below) to substitute a non-bright test for the one appellant actually proposes, which is as bright as *MCFL*'s. And the proposed test nowhere requires inquiry into "the purposes of individual disbursements." Not even BCRA's prime sponsors thought "purpose" was an appropriate part of a bright-line rule permitting authentic grass-roots lobbying. *See* J.S. at 28 & n.26.

at 5-6, that demonstrate that the proposed advertisements herein are authentic grass-roots lobbying and not electioneering, wrongly claiming that "[a]ppellant does not make clear whether it views all 16 factors as necessary . . . ." *Motion* at 15. Appellant plainly said that "[e]ither the broadcast communications proposed on the facts of this case [16 factors] or the carefully-defined distillation of them into the *proposed bright-line rule* just set out eliminates the concerns recognized by this Court as justifying the prohibition." J.S. at 29 (emphasis added). This as-applied challenge does not "reintroduce . . . indeterminacy," *Motion* at 15, but even if it did, constitutionally protected rights come first. *MCFL*, 479 U.S. at 263.[5]

The FEC still has not provided any precedent for the proposition that one facial decision may preclude *all* future applied challenges, although it makes its best effort by citing *Goland v. United States*, 903 F.2d 1247, 1258-59 (9th Cir. 1990). *Motion* at 16-17 & n.4. Space limitations preclude listing the several distinctions between *Goland* and the present case,[6] but a key quotation resolves its non-application to the present issue: "The issues Goland raises were resolved by the Court in *Buckley*, and no feature of his admittedly distinctive factual situation distinguishes his case." 903 F.2d at 1258. Simply put, if his factual situation *had* distinguished his case, his case would not have been

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[5]The FEC failed completely to respond to "the option of using only funds from a "separate bank account" to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E), [which] would eliminate even more concerns, if necessary." J.S. at 29.

[6]For example, Goland argued that the contribution limit was unconstitutional as applied to him because it inhibited his ability to make an *illegal* anonymous contribution. 903 F.2d at 1259. And *Goland* is a contributions limit case for which a lower standard of review applies, *Buckley*, 424 U.S. at 25, just as *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 654-55 (1981), was decided under the even lower reasonable time, place, and manner standard. Citing these cases in the present strict scrutiny context is mixing apples and oranges.

dismissed. *Goland* did not say that all as-applied challenges to contribution limits were precluded by *Buckley*'s facial upholding of contribution limits. It provides no support for the notion that a facial decision may preclude all future as-applied challenges.

In sum, the FEC argued not for a bright line rule per se (which is maintained in the proposed rule distilled from the facts) but for one bright line over another—the one that gives the FEC the exclusive jurisdiction to consider as-applied exceptions and shuts out Article III courts.

II. Whether a Grass-Roots Exception Should Be Recognized Is a Substantial Question.

The FEC's sole argument against an exception as applied to grass-roots lobbying in general was its bright-line argument that has already been discussed and rejected in Section I. *Supra*. The FEC notably failed to show the insufficiency of (or even address) the proposed bright-line rule to identify authentic grass-roots lobbying, which rule was adapted from the proposal by BCRA's prime sponsors. *See* J.S. at 28. And the FEC failed to respond to the demonstration of all the sorts of ads that this rule would eliminate, making such communications "of little or no value for the purposes of opposing/supporting candidates, [although they are] essential to self government." J.S. at 29.

As applied to appellant's three specific proposed ads, the FEC failed to substantively address the 16 identified factors demonstrating that the proposed ads were authentic grass-roots lobbying and not electioneering. No flaw was identified with the argument that such ads with such characteristics pose no threat to the electoral system and are essential to self-government.

Instead, the FEC focused on matters that may not fairly be considered in an attempt to establish the "inference that [the ads] were in the heartland of Congress's concerns." *Motion* at 20. First, the FEC argued that statements made by an appellant's PAC may be attributed to the corporation. *Motion* at 19. The FEC failed to show any precedent (or

statute) allowing attribution of things done by a corporation's PAC to the corporation itself. In fact, it is contrary to clearly-established law, which defines both independent expenditures and electioneering communications based on what the communication itself says, not on what else an organization does.[7]

Second, the FEC argued that there is no evidence that the three proposed advertisements were run after the November elections. As noted in footnote 7 below, this is not a proper question for determining whether a communication is either an express advocacy communication or an electioneering communication as the equivalent of express advocacy. It is also beyond the record of this case. And it has no bearing on appellant's asserted desire to make such communications in the future on the basis of a proposed bright-line exception for genuine grass-roots lobbying.

The FEC has studiously avoided coming to grips with the need for a genuine grass-roots lobbying exception. This demonstrates a hostility to the needs of the people for this vital tool of self-governance. As established in the *Jurisdictional Statement*, Judge Leon in *McConnell* perceived the

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[7]Whether a communication constitutes an independent expenditure turns solely on whether the communication *itself* contains explicit words expressly advocating a clearly identified candidate's election or defeat. 2 U.S.C. § 431(17), (18). The corporate prohibition expressly *excludes* any consideration of PAC activity in determining whether a corporation has made an independent expenditure or an electioneering communication. 2 U.S.C. § 441b(b)(2)(C) ("*shall not include* . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" (emphasis added)). "Electioneering communication" is defined as a "communication" meeting certain criteria. 2 U.S.C. § 434(f)(3). Nowhere in the definition is there any instruction to see whether the organization's PAC said anything. Even the grass roots lobbying exception proposed by BCRA's prime sponsors, J.S. at 28, did not include any examination of what a group's PAC had done. Rather the proposed exception looked solely at the words of the communication itself, examining only the "four corners" of its transcript. That is the required approach.

necessity for genuine grass-roots lobbying and saw it as different in kind from the sort of sham issue ads at issue in that case. *See* J.S. at 25-27 & n.25. This Court likewise distinguished lobbying from sham issue advocacy. J.S. at 27. There is no principled reason to deprive the people of their freedom to speak, associate, and petition through their citizen advocacy groups when vital legislative (and executive) branch actions are being decided by the people's representatives in proximity to elections when there is a readily-available bright-line rule to distinguish authentic from sham. *See* J.S. at 28.

Conclusion

For the reasons stated herein and in the *Jurisdictional Statement*, the Court should deny the *Motion to Dismiss or Affirm*. Rather, the Court should note probable jurisdiction. Alternatively, the Court should summarily reverse the district court's dismissal and remand this case with instructions to expeditiously decide the already briefed cross-motions for summary judgment.

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In The
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., *Appellant,*

v.

FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

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Corporate Disclosure Statement

Wisconsin Right to Life, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument

I. Campaign Finance Laws Cannot Be Used to Shield Incumbent Politicians from Grassroots Lobbying.

Can incumbent politicians shield themselves from grassroots lobbying about upcoming votes in Congress through campaign finance laws? The Federal Election Commission believes that politicians can do so, Brief for the Appellee 35-44 ("FEC Br."), and incumbent members of Congress enthusiastically agree. Brief of *Amici Curiae* Senator John McCain, et al. 18-22 ("McCain Br."). Through the prism of personal political ambition—most acutely, reelection—nearly everything affects federal elections. Some of those things are beyond the ability of Congress to directly regulate, e.g., the Katrina hurricane, finding Osama Bin Laden or Saddam Hussein's weapons of mass destruction, or population shifts in the U.S. However, the speech of citizens about their government is not so far removed from government restriction. As a result, between 1798 and 1801,[1] 1918 and 1921,[2] and most recently since 1974,[3] Congress has taken a very

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[1]The Sedition Act of 1798 forbade conspiring "with intent to oppose . . . measures of the government" and bringing either Congress or the President "into contempt or disrepute." 1 Stat. 596-97. James Madison "deplored especially the Sedition Act, 'levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian on every other right'" and viewed them "as palpable and alarming infractions of the Constitution." Ralph Ketcham, *James Madison* 396, 402 (1990) (citations omitted).

[2]The Sedition Act of 1918 punished anyone who did "willfully utter . . . or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States . . . or advocate, teach, defend, or suggest the doing of any [such] act." 40 Stat. 553.

[3]Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 ("FECA").

broad view of its ability to regulate, limit, and prohibit the speech of citizens about their government. While some of these efforts have been found consistent with sufficiently important or compelling governmental interests, some have not. Under a First Amendment regime of "Congress shall make no law,"[4] citizens are entitled to robust participation in their government, even if that participation influences elections. This is true here.

Congress, in adopting the 1974 Amendments to the FECA, imposed severe limits on the speech of candidates, citizens, and citizens groups. Activities that were "made by any person for the purpose of influencing any election for Federal office" were defined as a "contribution," 2 U.S.C. § 431(8)(A)(i), or an "expenditure," § 431(9)(A)(i), and then subjected to extensive regulation. If a group spent more that $1,000 on a "contribution" or an "expenditure," it was deemed a political committee, subject to extensive regulation. § 431(4)(A). If someone independently made an "expenditure" of over $250, the expenditure had to be reported to the government. § 434(c)(1). Furthermore, if a person made an expenditure "relative to a clearly identified candidate," the person could not spend more than $1,000. 18 U.S.C. § 608(e)(1) (Supp. IV 1970). And corporations and labor unions were prohibited[5] from making any "contribution" or "expendi

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[4]U.S. Const. amend. I.

[5]With respect to 2 U.S.C. § 441b, "prohibit" herein means that the corporation or labor union "is *not* free to use its general funds for campaign advocacy purposes," including for electioneering communications, but may use PAC funds for this purpose. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 (1986) ("*MCFL*") (emphasis in original). "While that is not an absolute restriction on speech, it is a substantial one." *Id.; see also McConnell v. FEC*, 540 U.S. 93, 203-04 (2003) (describing the purpose of § 441b as "to *prohibit* contributions

(continued...)

ture" "in connection with" federal elections. 2 U.S.C. § 441b(a).

In its zeal to exercise the full extent of its perceived power to regulate speech that affects federal elections, Congress not only wrote broadly, but vaguely. Since the First Amendment demands that laws impinging on speech and association must be written precisely, *NAACP v. Button*, 371 U.S. 415, 438 (1963), this Court narrowly construed the vague terms "influence," "relative to," and "in connection with" in the FECA to encompass only speech that expressly advocated the election or defeat of a clearly identified candidate. *Buckley v. Valeo*, 424 U.S. 1, 44, 80 (1976); *MCFL*, 479 U.S. at 249. This narrow construction, necessitated by Congress's ill-considered use of vague terms to define the reach of its regulations, resulted in extensive use of "issue ads," as citizens and groups sought to influence their government, some with the intent or effect of influencing federal elections.

Of course, incumbent politicians in Congress were deeply dissatisfied with this state of affairs and ultimately passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), including regulation of and restrictions on what was defined as an "electioneering communication." 2 U.S.C. § 434(f)(3)(A)(i). Here, Congress again

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(...continued)
or expenditures by corporations or labor organizations in connection with federal elections," *id.* at 203 n.86 (emphasis added), but rejecting that it is a "complete ban," since PAC funds may be spent for such purposes, *id.* at 204). The PAC option imposes substantial burdens on the funding of electioneering communications. WRTL Br. 40-42. Furthermore, if an electioneering communication is coordinated with an incumbent politician/candidate, such as a bill's sponsor, it would be subject to contribution limits and, thus, severely limited in the amount spent. § 441a(a)(7)(C).

wrote broadly,[6] but it did not write vaguely. *McConnell*, 540 U.S. at 194. Thus, the definition of "electioneering communication" was not subject to vagueness attack, as several provisions of the FECA had been, but in the facial challenge launched in *McConnell* the question was whether the definition was substantially overbroad. *Id.* at 205. The FEC and the BCRA's sponsors defended the definition of "electioneering communication" under this Court's decision in *Buckley*, which upheld the regulation of "express advocacy." *Id.* This Court found that "the vast majority of ads" were the "functional equivalent of express advocacy," *id.* at 206, and, as a result, the definition was not substantially overbroad. *Id.* at 207. This Court noted that "express advocacy" was not constitutionally required and, thus, did not define the outer limits of Congress's power to regulate under the First Amendment. *Id.* at 190-94.

But what is to be done about those ads caught up in the broad definition of "electioneering communication" that are not sham issue ads, but "genuine issue ads," which this Court found, *id.* at 206 n.88, and the FEC continues to acknowledge, FEC Br. 19, 23, 24, are not the functional equivalent of express advocacy? Of course, the normal remedy for the protection of speech not legitimately subject to government regulation through a facially valid statute is for the courts to bar the application of the statute to the protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). But the FEC argues that genuine issue ads still must be prohibited, even though they are not within the category of speech where there is a corporate corruption interest in prohibit-

[6]The only content requirement for an "electioneering communication" is that it "refers to a clearly identified candidate for Federal office." § 434(f)(3)(A)(i)(I). This means that all communications with this reference are captured, whether they concern a federal election or not.

ing them, because the ads may have been aired with the intent to influence elections, FEC Br. 17, or may have such an "incidental impact." *Id.* at 16; *see generally id.* at 40-44.

So we have come full circle. Incumbent politicians want to regulate or prohibit anything that might influence their election. This is as though there were nothing else going on in government other than the next election. In fact, day after day, government is exercising its lawmaking power over the People and the People want to influence the exercise of that power through lobbying their government. "Lobby groups," like WRTL, are established, under section 501(c)(4) and 501(c)(3) of the Internal Revenue Code, to educate and lobby on issues of public concern. Their primary purpose is not elections but influencing public policy, and they provide a voice for millions of persons of average means who want to join together in that effort. These groups use grassroots lobbying to enlist their fellow citizens in lobbying efforts.

Of course, elections and lawmaking often overlap. Congress is often in session within 30 days of the various primary elections held throughout the United States in election years. Furthermore, Congress is invariably in session within 60 days of a general election, when legislators often deal with the most significant and controversial matters. But reading the briefs of the FEC and its amici, one would have no idea that government was functioning during the blackout periods, or that the People would have any interest or right to influence those lawmaking activities. This can only be explained by the obsessive focus of incumbent politicians, and political consultants and commentators, on elections. However, the real work of government is not elections, but lawmaking, which is exactly what WRTL and numerous other advocacy groups are primarily created to influence.

The precedents of this Court recognize that more than elections are happening in government and have affirmed a robust role for citizens and citizens groups in commenting on the actions of public officials in office, *New York Times v. Sullivan*, 376 U.S. 254 (1964), and on controversial public policies, *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980), and in influencing the lawmaking role of government. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 675-78 (1990) (Brennan, J., concurring). This Court, in *McConnell*, reiterated this distinction, pointing out that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," which "sets [the BCRA] apart from the statute in *Bellotti*—and, for that matter . . . *McIntyre*." *McConnell*, 540 U.S. at 206 n.88.[7]

While it is certainly true that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," *Buckley*, 424 U.S. at 42, this is a justification for rigorous court scrutiny to protect citizens' participation in the ongoing debates about government. So there are three options here. Since both grassroots

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[7]The FEC acknowledges this distinction in passing, FEC Br. 41 (citing *Bellotti* for the proposition that "corporate 'electioneering,' as defined by statute, poses distinct dangers to the integrity of the electoral process that other forms of corporate advocacy do not present"), and the BCRA's sponsors seem oblivious of this line of cases or have turned a blind eye to their own lawmaking role and the legitimate role of citizens in influencing it. *See generally* McCain Brief.

lobbying and express advocacy might influence federal elections, one could (1) protect both grassroots lobbying and express advocacy from government restriction, *McConnell*, 540 U.S. at 326-28 (Kennedy, J., dissenting), (2) prohibit both, as the FEC and incumbent politicians want, FEC Br. 43 ("[A]ny restrictions that BCRA imposes on the financing of advertisements that in fact have no electioneering purpose are simply the incidental byproduct of Congress's need to employ a bright-line rule to prevent corporate treasury funds from being used to influence federal elections."), or (3) recognize a distinction between them. *McConnell*, 540 U.S. at 206 n.88; *Austin*, 494 U.S. at 678 (Stevens, J., concurring) ("[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other."). This Court's precedents recognize a distinction that demands protection for grassroots lobbying from prohibition by campaign finance laws.

II. *McConnell* Did Not Preclude As-Applied Challenges to the Electioneering Communication Prohibition, and a Grassroots Lobbying Exception Is Workable.

The FEC argues, by oft-repeated[8] terms, (1) that *McConnell* upheld "all applications" of a "bright-line," "prophylactic" electioneering communication prohibition, and (2) that WRTL proposes an "unworkable" intent test and/or "no test" at all for grassroots lobbying, which will lead to "fact-intensive" litigation.

But narrow tailoring proscribes prophylaxis, bright lines are desirable only to protect free expression and speakers (not the FEC), and *McConnell* expressly upheld

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[8]The FEC uses "all applications" 9 times, "bright-line" 13 times, "prophylaxis" 12 times, "intent" test 9 times, "no" test 7 times, and "fact-intensive" (similar phrases) 5 times in its Brief.

the prohibition because "genuine issue ads" were not sufficiently "substantial" in number for facial invalidation of the electioneering communication prohibition.

And WRTL has never proposed an intent test for grassroots lobbying, and it rejects such a test as truly unworkable. No test is actually required to resolve this case because WRTL's broadcast ads are plainly grassroots lobbying. If this Court wishes to exempt all grassroots lobbying, WRTL has identified several factors appropriate for such a test.

A. *McConnell* Did Not, and Could Not, Bar As-Applied Challenges.

In the district court in *McConnell*, the FEC argued that this Court must apply facial, First Amendment substantial overbreadth analysis to BCRA's electioneering communication definition:

> [N]one of these plaintiffs . . . has described particular advertisements, referring to clearly identified candidates for federal office, that they plan to run in proximity to one or more federal elections, to which they contend BCRA's application would be unconstitutional. Accordingly, to prevail, the Title II plaintiffs must establish that BCRA's regulation of electioneering communications could never be applied in a valid manner, or is substantially overbroad.

FEC Br. 131, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582) (citations and internal quotation marks omitted). The FEC conceded overbreadth, but insisted that it was not substantial, so that the definition must be upheld facially, and as-applied challenges should later be employed to cure overbreadth in cases of the present sort:

> the definition's overbreadth is no more than two to six percent—a far cry from the substantial overbreadth necessary to invalidate a statute on

> its face. Even if a few genuine issue ads will be subject to BCRA's regulation of electioneering communications, the Court cannot conclude that [BCRA] is substantially overbroad and must assume that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Id. at 161 (citations and internal quotation marks omitted). Before this Court, the FEC repeated the same argument: "To the extent that the definition is not *perfectly* tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis, where a court would at least have the benefit of adjudicating the applicability of Title II to a concrete controversy." FEC Br. 105-06, *McConnell*, 540 U.S. 93 (No. 02-1674) (emphasis in original).[9]

Now that this Court in *McConnell* has employed the very analysis that the FEC and the BCRA's prime sponsors requested by applying a *Broadrick* substantial overbreadth analysis to facially uphold the prohibition, *McConnell*, 540 U.S. at 205-07, the FEC insists that as-

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[9]The Intervenor BCRA sponsors also advised this Court in *McConnell* that it should allow as-applied challenges later:

> Title II poses little risk of the sort of chilling effect that can justify the facial invalidation of an overbroad law . . . . These corporat[ions] . . . are not likely to be chilled in their speech, or to be unable to assert their rights if and when there is a realistic threat that the Act may be applied to them in some unconstitutional way. In these circumstances, awaiting as-applied challenges, arising in specific factual contexts, is by far the wiser course.

Redacted Brief for Intervenors 64, *McConnell*, 540 U.S. 93 (No. 02-1674).

applied challenges are precluded by *McConnell*.[10] In making its neither-then-nor-now argument, the FEC ignores most of WRTL's arguments in a studied attempt to redirect the Court's attention away from the FEC's own *Broadrick* argument to a newfangled "prophylaxis" claim.[11]

First, the FEC's Brief makes no mention of Article III and this Court's adjudication principles, which govern whether WRTL may now be deprived of its due process right to an as-applied challenge to the electioneering communication prohibition. *See* WRTL Br. 11-13.

Also absent is a response to WRTL's explanations of the obvious meanings of two statements in *McConnell*, on which the FEC particularly relies; the first at page 190 n.73 ("We uphold all applications of the primary definition and accordingly have no occasion to discuss the backup definition.") and the second at page 239 (restrictions on all electioneering communications were upheld facially because they "*often* convey [a] message of support or opposition"). *See* WRTL Br. 13-15. The FEC twice even misstates what the Court said in footnote 73 in an effort to make its case. *See* FEC Br. 14 ("challenged BCRA *provisions* [not "*definition*"] were valid in *all* their applications" (emphasis on "provisions" added)), 21 ("*restrictions*

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[10]The FEC should be estopped from now asserting that as-applied challenges are precluded. In similar situations, where a party has argued clearly inconsistent positions and has persuaded a court to rely on the former (especially where that party would gain an unfair advantage thereby), this and other courts have employed judicial estoppel to deny reliance on the second, inconsistent argument. *See New Hampshire v. Maine*, 532 U.S. 472 (2001); *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469 (6th Cir. 1988); *Fieldwork Boston, Inc. v. United States*, 344 F. Supp. 2d 257 (D. Mass. 2004).

[11]The FEC never mentioned "prophylaxis" in its *McConnell* Brief justifying the "electioneering communication" provision.

on the funding of 'electioneering communications' . . . are constitutional in '*all* applications'") (emphasis on "restrictions" added).

Absent from the FEC Brief is any discussion of the Court's statement in *McConnell*'s footnote 88 that "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *See* WRTL Br. 13.

Absent is any mention of the key analytical statement in *McConnell* requiring proven functional equivalence to express advocacy before government regulation is permissible:

> [P]laintiffs['] argu[ment] that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications . . . . *fails to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the *functional equivalent* of express advocacy.

540 U.S. at 205-06 (emphasis added). *See* WRTL Br. 33-39. Instead, the FEC misleadingly states that this Court found that "the vast majority" of ads captured by the electioneering communication definition "were intended to influence electoral outcomes." FEC Br. 10 (citation omitted); *see also id.* at 27.

Also absent is any citation to language in *McConnell* saying that the challenged prohibition was "narrowly tailored," which would be necessary to support the FEC's assertion that "this Court . . . upheld a bright-line rule as narrowly tailored . . . in *McConnell*." FEC Br. 43. This Court never said that the prohibition was narrowly tailored, choosing instead to leave narrow tailoring issues for as-applied challenges (as the FEC expressly urged,

infra) and facially upheld the prohibition because the overbreadth of the prohibition, reaching beyond functional equivalents of express advocacy to genuine issue ads, was not "substantial." *McConnell*, 540 U.S. at 207.

These failures to respond to critical arguments should be decisive in WRTL's favor. But the radical nature of what the FEC does argue should also be decisive.

The FEC insists that "prophylaxis" is appropriate in strict scrutiny. FEC Br. 14-15, 17-24. The FEC uses "prophylaxis" synonymously with "a clear bright-line rule that correlates *closely*, though admittedly *not precisely*, with intent to influence federal elections," *Id.* at 15 (emphasis added). Because prophylaxis would permit the prohibition to be "closely" tailored to a compelling interest, rather than narrowly (i.e., "precisely") tailored, it defines an intermediate scrutiny,[12] which is plainly the antithesis of narrow tailoring and strict scrutiny.[13]

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[12]In fact, the FEC's support for "prophylaxis" rests explicitly on this Court's contribution limits cases, FEC Br. 25, where heightened, not strict, scrutiny is applied. *McConnell*, 540 U.S. at 231. *See also MCFL*, 479 U.S. at 260 (explaining that "a broad prophylactic rule" is appropriate for restrictions on contributions, but not for "political speech warranting the highest constitutional protection"). Further the FEC's reference to *Austin* having foreclosed as-applied challenges, FEC Br. 25, is simply incoherent in light of *MCFL*, which *Austin* reaffirmed, not overruled. *Austin*, 494 U.S. at 661-62.

[13]As this Court has stated:

> [N]arrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored. *E.g.*, *Consolidated Edison Co.*, 447 U.S. at 537-38. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP*, 371 U.S. at 438 (citations omitted).

(continued...)

Nonetheless, the FEC represents that "much of the dispute among the [*McConnell*] parties concerning the [electioneering communication] restrictions centered on the degree of prophylaxis in BCRA's primary definition and on whether any prophylaxis was permissible under the First Amendment," *id.* at 13, and asserts that this Court approved a broad prophylactic rule, while applying strict scrutiny to this restriction on core First Amendment expression. *Id.* at 14.

What is the FEC's evidence that this Court actually did this? The FEC claims that "[t]he Court in *McConnell* nevertheless sustained BCRA's bright-line approach and held that the challenged BCRA provisions were valid in *all* their applications." *Id.* (emphasis in original). As the FEC tells the story, even though this Court was fully aware of "pure issue advertisements," it nonetheless "squarely held that the definition is constitutional in *all* its applications." *Id.* at 17 (emphasis in original). So, says the FEC, while ordinarily as-applied challenges would be permitted after a facial challenge was rejected, "in this case the prophylactic nature of the provision at issue, the pointed constitutional challenge to such prophylaxis, and the reasoning of the Court in *McConnell* in rejecting that challenge necessarily preclude subsequent as-applied attacks." *Id.* at 18.

But the narrow-tailoring prong of strict scrutiny precludes prophylaxis here, as already noted. And WRTL explained why *McConnell's* footnote 73's "all applications" statement was only saying that there was no need to look

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[13](...continued)
Riley v. National Federation of the Blind, 487 U.S. 781, 801 (1988). *See also In re Primus*, 436 U.S. 412, 432-33 (1978) (cautioning that "First Amendment freedoms need breathing space to survive, [and] government may regulate in [this] area only with narrow specificity"); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); *United States v. Robel*, 389 U.S. 258, 266 (1967).

at the backup definition of "electioneering communications," because the Court had upheld the primary definition as to all applications *in the statute*, not in all future as-applied challenges. *See* WRTL Br. 13-15. Thus, the FEC's argument relies exclusively on a misstatement of what this Court meant in facially upholding "all applications" of the "electioneering communication" definition in the statute.

Moreover, there is a straightforward explanation for what the Court did in *McConnell*. In *McConnell*, this Court was faced with a facial challenge, which required the Court to determine if the prohibition on corporate expenditures for electioneering communications was substantially overbroad. Finding that it was not, there was nothing else to decide, particularly as-applied challenges that had not been brought.

Bright lines are extolled by the FEC, which argues that *McConnell* precluded as-applied challenges, because this Court had supposedly agreed that a broad, bright-line test was necessary. The FEC argues that WRTL's proposed grassroots lobbying exception will "multiply litigation," "substantially complicate the administration of federal restrictions on corporate and union electioneering," and introduce "vagueness." FEC Br. 34. Bright-line tests are important, of course, to protect free expression under the First Amendment, but they are to protect speakers from vague laws, not to protect enforcement officials or to enhance the reach of speech prohibitions beyond their justifiable bounds. They do not justify abandoning the fact-sensitive scrutiny required in narrow tailoring.

In *MCFL*, this Court expressly rejected a similar call by the FEC to uphold the bright-line prohibition of

electioneering by *all* corporations,[14] found in § 441b. Instead, this Court held that the bright-line prohibition on all corporations could not be constitutionally applied to *MCFL*-corporations, which exhibited certain characteristics, 479 U.S. at 263-64,[15] since "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Id.* at 265. Further, in *McConnell*, this Court recognized the first as-applied exemption to the "electioneering communication" prohibition itself by holding that it could not be constitutionally applied to *MCFL*-corporations. *McConnell*, 540 U.S. at 211.

In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), the presumption that all political party expenditures were always coordinated with their candidates, coupled with a strict spending limit on such expenditures, created a very bright line, but this Court rejected that bright line as inconsistent with free expression guarantees. Instead, this Court found the

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[14]*MCFL* was not the first as-applied challenge to § 441b this Court has upheld. In *United States v. CIO*, 335 U.S. 106, 123-24 (1948), this Court held that the ban on corporate and union expenditures did not apply to the CIO News, which was distributed to union members and subscribers. The FEC rule on this membership communication exemption hardly qualifies as bright line. *See* 11 C.F.R. § 100.134.

[15]The FEC now calls this exception a "bright line," after arguing against it in *MCFL* on bright-line grounds. But it does so for the same reasons, to enhance the reach of government's speech prohibition. Defending the corporate prohibition meant that all corporations' speech would be banned, including *MCFL*-corporations where the prohibition was not justified. And by now defending a narrow and wooden definition of the characteristics that exempted *MCFL*-corporations from the ban, *see* 11 C.F.R. § 114.10(c), fewer non-profit corporations would benefit from the prohibition's exemption. *See* WRTL Br. 31 n.24.

FEC's coordination presumption invalid and held that the "Party Expenditure Provision" was unconstitutional as applied to independent expenditures. *Id.* at 623-24. That coordination must be proven, not presumed, is consistent with First Amendment narrow-tailoring protections, but it is certainly not a bright line. Rather, it is a multi-factor, somewhat vague, test.[16]

Throughout the *McConnell* litigation, those supporting the electioneering communication definition argued that they could prove that the substantial portion of the speech captured was in fact election-related, not a prophylaxis. Examining the evidence, this Court agreed that they had done so. That leaves the acknowledged capture of speech that has nothing to do with elections. Under strict scrutiny, as-applied challenges are required to sort out the misapplications of the bright-line rule because there is no prophylaxis in narrow tailoring.

B. If Needed, Workable Tests Separate Grassroots Lobbying from Electioneering.

The FEC's essential argument against recognition of a grassroots lobbying exemption is that WRTL proposed an "unworkable" "intent" test and/or "no test" for grassroots lobbying, which would lead to "fact-intensive" litigation.

In fact, WRTL has proposed that a grassroots lobbying exemption should be based exclusively on the content of the communication, just as "electioneering communication" and "independent expenditure" is defined, WRTL Br. 35-39, and WRTL referred to the IRS's definition of "grassroots communication," *id.* at 21, which the FEC ignores in saying that "no test" has been proposed. WRTL

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[16] *See* 11 C.F.R. §§ 109.20, 109.21; FEC Notice of Proposed Rulemaking, Coordinated Communications, 70 Fed. Reg. 73946 (Dec. 14, 2005).

has never proposed an *intent* test and rejects such a test as truly unworkable; it would lead to the "fact-intensive" litigation that the FEC claims to despise. Instead, the FEC itself wants to litigate the purported subjective intent of WRTL behind its grassroots lobbying ads based on the activity of its PAC, FEC Br. 11-14, which argument WRTL opposed (and to which the FEC has provided virtually no response). WRTL Br. 35-39. Furthermore, approval of the FEC's intent or incidental effects test[17] would grant Congress authority to restrict, year-round, myriad activities[18] by the People as they seek to participate in their government. This Court has already rejected such a test.[19]

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[17]The FEC refers approvingly to regulation of speech which has the intent and/or effect of influencing elections 17 times.

[18]James Madison condemned the Sedition Act because "[t]o prohibit the *intent*, then was to prohibit the 'actual excitement' of derogatory attitudes toward government, which, further, was to prohibit *discussion*, and finally, to protect the administration against criticism even when it 'deserves the contempt or hatred of the people.'" Ketcham, *James Madison* at 402 (citation omitted) (emphasis added).

[19]This Court expressly eschewed any subjective intent or effect test in *Buckley*, 424 U.S. at 43 (citations and quotation indicators omitted) (emphasis added):

> Whether words intended and designed to fall short of invitation would miss that mark is a *question both of intent and of effect*. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In

(continued...)

Actually, no test is required here because the proposed broadcast ads are plainly grassroots lobbying[20] and the prohibition fails strict scrutiny as applied to them. This Court could simply declare the prohibition unconstitutional as applied to the broadcast ads in this case and leave for future cases the identification of factors essential to an as-applied grassroots lobbying exception.

But WRTL believes a decision establishing more general guidelines would be helpful and has requested that this Court distill the factors vital to its decision, as it did in *MCFL*. 479 U.S. at 263-64. So WRTL returns to discussing appropriate elements for such a test. *See* WRTL Br. 21.

Preliminarily, WRTL has never proposed a test based on the unique "details of WRTL's broadcast ads," WRTL Br. 4 n.4, so the FEC's claim, FEC Br. 15, that WRTL proposes a "16-factor test" is wrong. Rather, WRTL cited the IRS definition of "grass roots lobbying communication," which is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof" and has three "required elements": (1) "refers to specific legislation," (2) "reflects a view on such legislation," and (3) "encourages the recipient of the communication to take some action with respect to such legislation." 26 C.F.R. § 56.4911-2(b)(2)(i)-(ii). Since a general grassroots lobbying exception should apply to both legislative and executive branch actions, this should be made clear in any rule. Further, to prevent any risk of an attempt to influence an election, a grass-

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(...continued)

these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

[20]While contact information for the two Senators was not provided in the ads, viewers were invited to visit befair.org, which prominently displayed all the contact information for both Senators.

roots lobbying communication should not mention the pending election, the incumbent politician's candidacy, or the identity of any challenger. This would provide a workable definition for grassroots lobbying and avoid *McConnell*'s concerns about "sham issue ads."

Furthermore, BCRA's prime sponsors proposed a useful, but more restrictive, test. *See* WRTL Br. 24 n.19. This test properly includes both legislative and executive branch matters, but prohibits the naming of the incumbent politician/candidate (even though he or she could be clearly referred to, such as saying something like "please contact Senator Kohl and your other Senator"), and prohibits stating his or her position on the matter that is the focus of the grassroots lobbying. Judge Leon provided, from the *McConnell* record, a compelling explanation of why naming an incumbent politician/candidate must be permitted. *See* WRTL Br. 44 n.31.[21]

But what all these tests have in common is that they demonstrate that the FEC is wrong when it says that no further exceptions should be permitted to the electioneering communication prohibition, beyond those already recognized by FEC rulemaking[22] and by this Court in *McConnell*, because a grassroots exception could not be confined. A grassroots lobbying exception, however, could be readily cabined and would not permit the sort of sham issue ads this Court found problematic in *McConnell*.

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[21]This model could be further refined, as explained at Jurisdictional Statement 28-29, which demonstrates that an exceptionally bright line can be drawn to separate genuine grassroots lobbying from "sham issue ads." While WRTL would be able to broadcast its three proposed ads, and substantially similar ones, under this ultra-bright-line test, WRTL does not believe that the Constitution requires such a narrow test.

[22]11 C.F.R. § 100.29, *as amended* 70 Fed. Reg. 75713 (Dec. 21, 2005).

Moreover, the right of the people to self-government in a Republican system of representative government, protected by the First Amendment rights of expression, association, and petition, compel the recognition of such an exception.

Conclusion

This Court should find the electioneering communication prohibition unconstitutional as applied to grassroots lobbying generally, or as applied to the three broadcast advertisements here. Alternatively, the prohibition should be declared unconstitutional as applied, if made with disbursements from a segregated bank account as described in 2 U.S.C. § 434(f)(2)(E) (donations only from individuals).[23] The case should be remanded for entrance of an appropriate injunction.

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[23]This is the segregated fund option that Congress established for those who could lawfully make electioneering communications.

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In The
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

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November 14, 2005

Questions Presented

1. Whether as-applied challenges are permitted to the prohibition on corporate disbursements for electioneering communications at 2 U.S.C. § 441b after *McConnell v. FEC*, 540 U.S. 93 (2003).

2. If so, whether the prohibition on electioneering communications is unconstitutional as applied to the facts of this case, and particularly

(a) the three specific grassroots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. here and/or

(b) grassroots lobbying communications generally,

with any communications to be funded either from a general corporate account or, alternatively, from a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E).

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

The disclosure statement in the *Jurisdictional Statement* is unchanged. Rule 29.6.

Notice of Statutory Expedition & Advancement on the Docket

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress specified that in reviewing constitutional challenges, such as the present one, "[i]t shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." BCRA § 403(a)(4), Pub. L. 107-155, 116 Stat. 81, 114.

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Opinions Below

The unreported district court *Order* and *Memorandum Opinion and Order* dismissing this case with prejudice are in the Appendix ("JS-App.") to the *Jurisdictional Statement* ("JS") at JS-App. 1a and 2a. The unreported *Memorandum Opinion and Order* denying preliminary injunction is included, JS-App. 4a-17a, because the opinion dismissing the case said that the court did so "for the reasons set forth in its prior opinion," i.e., the preliminary injunction opinion. JS-App. 2a-3a.

Jurisdiction

The *Order* and the *Memorandum and Order* dismissing this case were dated May 9 and filed May 10, 2005. WRTL's *Notice of Appeal of Dismissal to U.S. Supreme Court* was filed and served on May 12, 2005. JS-App. 33a. Appeal is taken pursuant to 28 U.S.C. § 1253 (direct appeal to the Supreme Court from decisions of three-judge courts denying a permanent injunction) and BCRA § 403(a)(3), 116 Stat. at 114 (direct appeal to the Supreme Court of the district court's "final decision"). JS-App. 23a.

Constitutional, Statutory, Regulatory Provisions

The First Amendment to the Constitution is in the *Jurisdictional Statement* Appendix at JS-App. 18a.

2 U.S.C. § 434(f)(1)-(3) (the "electioneering communication" definition) is at JS-App. 18a.

2 U.S.C. § 441b(a)-(b)(2) ("electioneering communication" prohibition) is at JS-App. 21a.

BCRA § 403 (jurisdictional statute) is at JS-App. 23a.

11 C.F.R. § 100.29 (definition) is at JS-App. 24a.

11 C.F.R. § 114.2(a)-(b) (prohibition) is at JS-App. 29a.

11 C.F.R. § 114.14 (prohibition) is at JS-App. 31a.

Statement of the Case

In the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, Congress defined "electioneering communications" as targeted, broadcast communications that reference a clearly identified candidate within 60 days before general (or special or runoff) elections and 30 days before primaries (or nominating conventions or caucuses). JS-App. 19a (2 U.S.C. §434(f)(3)). Congress prohibited corporations from using general treasury funds to pay for electioneering communications. JS-App.21a-22a (2 U.S.C. § 441b(a)-(b)(2)) ("prohibition").

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court upheld this prohibition against a First Amendment facial challenge, not being "persuaded that plaintiffs ha[d] carried their heavy burden of proving that [the prohibition] [wa]s [substantially] overbroad." *Id.* at 207 (citing *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

The present case is a constitutional challenge to the prohibition as applied to grassroots lobbying, brought under the First Amendment guarantees of free speech, association, and petition and under the inherent, reserved constitutional right of the sovereign people in a republican system of government to communicate with citizens urging them to contact their representatives concerning pending legislative matters.

In July 2004, Senate filibustering of President Bush's judicial nominees reached unprecedented, double-digit levels and was coming to a head. On July 21, the Senate failed to invoke cloture on the ongoing filibuster of the nomination of William Gerry Myers III as a judge on the U.S. Court of Appeal for the Ninth Circuit. Record 30:3[1]

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[1]References to the Record are to the docket number assigned to each document followed by the internal page number of the document (if any such point cite is needed).

(*Amended Verified Complaint* ¶ 8 ("*AVC*"))[2]; 150 Cong. Rec. S8459-60. A fall showdown was predicted. Record 30:3 (*AVC* ¶¶ 8-11); Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1.[3]

WRTL launched a grassroots lobbying campaign encouraging its Senators to oppose the filibuster. Record 30:3-4, 7-8 (*AVC* ¶¶ 12-13, 25-33). On July 26, 2004, WRTL began broadcasting a radio advertisement entitled "Wedding." Record 30:3 (*AVC* ¶ 12), JS-App.6a. The district court included a transcript of "Wedding" along with the transcripts of WRTL's two other proposed advertisements at the end of its August 17, 2004 *Memorandum and Order*, JS-App. 13a-17a (*AVC* Exhibits A-

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[2]WRTL relies on the *AVC* (Record 30) and the *Affidavit of Barbara L. Lyons* ("*Lyons Affid.*") (Record 20, attachment 1; order granting motion to file affidavit, Record 21). There were also findings of fact ("FOF") made by the district court in its August 17, 2004 *Memorandum Opinion and Order* denying WRTL's preliminary injunction motion. JS-App. 4a-5a. These findings of fact include facts about activities by WRTL and its PAC beyond the pleadings and the grassroots lobbying communications at issue here. *Id.* The August 17 *Memorandum Opinion and Order* stated: "having considered the affidavits and representations of counsel, solely for the purposes of the motion for a preliminary injunction, the court makes the following findings of fact." JS-App. 4a. But the court incorporated the August 17 *Memorandum Opinion and Order*, along with its found facts, in its *Order*, JS-App. 1a, and *Memorandum Opinion and Order*, JS-App. 2a-3a, dismissing the case. *See infra* at note 7. The other activities of WRTL and WRTL-PAC are discussed *infra* at 35.

[3]Senate Republican leaders decided in November not to press the predicted confrontation at that time. *See* Paul Kane, *GOP Cools to Judicial Gambit*, Roll Call, Sep. 13, 2004. Majority reelection of President George W. Bush and Republican increases in both houses of Congress in the November 2004 election minimized the Democrat argument for filibusters somewhat, *see 'Nuclear' Truce*, Roll Call, Nov. 17, 2004, and the filibuster problem was at least temporarily put to rest by an agreement among a bipartisan coalition of Senators. *See* Paul Kane & Mark Preston, *Fourteen Senators Sign Off on Compromise*, May 23, 2005.

C).[4] WRTL intended to continue broadcasting "Wedding" and to begin and continue broadcasting the other two grassroots lobbying ads, and materially similar ads, throughout August 2004 and until the adjournment of Congress, including through electioneering communication prohibition periods. Record 30:3-4, 7 (*AVC* ¶¶ 12-13, 28-29); JS-App. 5a (FOF 10).

From August 15 to November 2, 2004 (80 days, including November 2), WRTL's ads would have been prohibited electioneering communications. Record 30:2,

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[4]The details of WRTL's broadcast ads indicate that they were authentic grassroots lobbying and not electioneering. As to *topic*, they concerned only a legislative matter that was specific and dealt with an issue in which WRTL had a clear and long-held interest. As to *timing*, the legislative action was under active consideration by the Senate then in session; the filibuster problem was coming to a head at the time; the timing was beyond the control of the communicator; and the ads were run outside the prohibition period as well as being planned to run within it. As to candidate *reference*, the only reference to a clearly-identified federal candidate was a statement urging the public to contact the candidate and to ask that he take a particular position on the legislative matter; the ads contained a link to contact information for the Senators (by reference to a website); and the ads identified two incumbent Senators, only one of which was up for election, and referred to the candidate and non-candidate equally. As to *tone*, the ads contained no reference to any political party, to the candidate's record or position on any issue, to the candidate's character, qualifications, or fitness for office, or to the candidate's election or candidacy; and they contained no words that promoted, supported, attacked, or opposed the candidate. In addition, they could have been run only with money from a "segregated bank account" under 2 U.S.C. § 434(f)(2)(E) (only donations from qualified individuals) if necessary to obtain injunctive relief. Record 30:9-10 (*AVC* ¶¶ 38-50). The ads were broadcast independent of any candidate or political party. Record 30:10 (*AVC* ¶ 50) (*see* 11 C.F.R. § 109.20(a)). These details demonstrate that, under any reasonable test, the ads were genuine grassroots lobbying.

4, 6 (*AVC* ¶ 6, 13-14, 23-34); JS-App. 4a-5a (FOF 3-4, 10-12)[5]

WRTL did not challenge the BCRA disclaimer and disclosure provisions for electioneering communications, intending to fully comply with them so that full disclosure of its identity and activities as required by law would have been forthcoming. Record 30:8-9 (*AVC* ¶¶ 35-37). The three proposed ads all contained the disclaimer language required by 11 C.F.R. § 110.11. Record 30:36 (*AVC* ¶ 36); *see* JS-App. 13a-17a (ad transcripts). WRTL's electioneering communication activity would have triggered a "disclosure date" of August 15, requiring it to file a report of electioneering communication activity by 11:59 p.m. on August 16. Record 30:8 (*AVC* ¶ 34).

Broadcast advertisements are the most effective form of communication for a grassroots lobbying campaign, and non-broadcast communications would not have provided WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message. Record 30:10 (*AVC* ¶ 51).

Using funds from WRTL's federal political committee fund ("WRTL-PAC") was an inadequate option.[6] As of

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[5]The ads clearly referenced candidate U.S. Sen. Russell Feingold, who was running for reelection in the September 14 primary and November 2 general election. Record 30:4 (AVC ¶ 14); JS-App. 5a (FOF 4, 10-11). They were to be broadcast for a fee on television and radio within 30 days before the primary and within 60 days before the general election; referenced a clearly identified candidate for federal office; were "targeted"; would have been "publicly distributed" as of August 15; and would have cost (by payment or contract) at that time more than $10,000 for direct production costs and airtime. Record 30:7-8 (*AVC* ¶ 25-33).

[6]In response to a question from the district court at the preliminary injunction hearing as to why WRTL could not simply fund its grassroots lobbying through WRTL-PAC, WRTL moved for and was

(continued...)

August 6, 2004, WRTL-PAC had $13,766.90 in its account. This money was the only money that could be used for federal contributions and independent expenditures. 2 U.S.C. § 431(8) and (17) (definitions). If WRTL-PAC funds had been used for the grassroots lobbying ads, those funds would not have been available for the contributions and independent expenditures that WRTL-PAC intended to make. Record 20, Attachment 1 at 1-2 (*Lyons Affid.* ¶¶ 1-7).

The approximately $14,000 in funds in the WRTL-PAC account in early August of 2004 would not have been sufficient for the planned advertising expenditures. The projected cost of WRTL's planned grassroots lobbying campaign was $100,000. PAC money is difficult to raise, being subject to source, amount, and disclosure requirements, and WRTL believed that it could not raise sufficient funds in its PAC to fund the grassroots lobbying campaign. Record 20, Attachment 1 at 2-4 (*Lyons Affid.* ¶¶ 8-17).

WRTL is a nonprofit (§ 501(c)(4)), nonstock, ideological Wisconsin corporation, but it does not qualify for any exception permitting it to pay for its broadcast ads from corporate funds. Record 30:6 (*AVC* ¶¶ 20, 22-23); JS-App. 4a (FOF 1, 3).

The Federal Election Commission ("FEC") is the government agency charged with enforcing the relevant provisions of the Federal Election Campaign Act ("FECA"), as amended by BCRA, and applicable regulations. Record 30:6 (*AVC* ¶ 21); JS-App. 4a (FOF 2).

On July 28, 2004,WRTL filed its verified complaint and sought a preliminary injunction to permit continued

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[6](...continued)
granted leave to file the *Affidavit of Barbara L. Lyons* ("*Lyons Affid.*"), specifically addressing that issue, on August 10, 2004. Record 20 (and Attachment 1), 21.

running of its grassroots lobbying ads past the August 15th beginning of the electioneering communication prohibition period. Record 1, 4. A three-judge court was convened pursuant to BCRA § 403(a)(1). Record 3, 9, 10. WRTL's preliminary injunction motion was denied August 12, 2004, Record 23, with a *Memorandum Opinion and Order* issued August 17th. Record 26; JS-App. 4a.

Pursuant to WRTL's declaration that it would not continue broadcasting its three ads (*see* JS-App. 13a-17a) beyond August 15, 2004, absent injunctive relief, WRTL ceased broadcasting its grassroots lobbying ads because they were then prohibited and for fear of enforcement by the FEC against WRTL. Record 30:10 (*AVC* ¶ 52).

On September 16, 2004, the district court sua sponte ordered briefing on whether the *AVC* should be dismissed. Record 32. On March 14, 2005, WRTL moved for summary judgment. Record 41. On March 28, the FEC did the same. Record 43. The cross-motions were denied as moot in the dismissal order. Record 49, JS-App. 1a.[7]

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[7]The procedural nature of the district court's action requires examination. Cross-motions for summary judgment were fully briefed, Record 41, 44-47, but the court instead dismissed the case with prejudice and stated that the summary judgment motions were moot. Under Rule 12(b), however, when "matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." The court relied on materials outside the pleadings, dismissing the case with prejudice "[f]or the reasons set forth in th[e] Court's Memorandum Opinion and Order dated May 9, 2005 . . . ." JS-App. 1a. The May 9th *Memorandum Opinion and Order* said that the Court had considered "the entire record herein" and dismissed the case "for the reasons forth in its prior opinion." JS-App. 2a-3a. The prior August 17th opinion did fact-finding, relying on facts outside the pleadings submitted by the FEC, and held (a) that *McConnell* precluded as-applied challenges and (b) that WRTL's grassroots lobbying ads were in any event excluded because WRTL's

(continued...)

The *Order* and the *Memorandum and Order* dismissing this case were filed May 10, 2005. JS-App. 1a-3a. As noted, *supra* at note 7, the court did so both on the bases that (a) *McConnell* precluded all as-applied challenges and (b) in any event (based on factors beyond the communications at issue), WRTL's activity was the sort of activity targeted by Congress in BCRA and so should not be recognized for an exception to the electioneering communications prohibition. WRTL noticed appeal on

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[7](...continued)
other activities made the grassroots lobbying ads the sort of activity targeted by Congress:

> Our reading of *McConnell* that as-applied challenges to § 441b are foreclosed is but one reason we find little likelihood of success on the merits. The facts suggest WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating. . . . Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. (See Def.'s Opp. Exh. 4, 16, 18). This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement (Def.'s Opp. Exh. 10-14), and the PAC announcing as a priority "sending Feingold packing." (Def.'s Opp'n Exh. 4.)

JS-App. 8a-9a. Thus, the district court clearly relied on "matters outside the pleadings" and decided the case on the merits under summary judgment. So it is appropriate for this Court to go to the merits. Expedition and judicial economy also argue in favor of doing so. BCRA § 403(a)(4), 116 Stat. at 114. This Court "has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). Review is de novo. *See, e.g., Coward v. ADT Sec. Systems*, 194 F.3d 155, 158 (D.C. Cir. 1999).

May 12, 2005. JS-App. 33a. Probable Jurisdiction was noted on September 27, 2005.[8]

Summary of the Argument

The FEC insists on having the exclusive right to consider and award or withhold as-applied exceptions to the electioneering communications prohibition. Although the FEC may consider as-applied challenges (by rulemaking and advisory opinions), it insists that an Article III court may not. This Court, however, did not preclude all as-applied challenges in *McConnell*, 540 U.S. 93. The language and analysis of *McConnell* indicate that this Court had no such intent, but rather that it was only considering a facial challenge and that it recognized that as-applied challenges were available to cure any overbreadth. Article III and this Court's prudential tenets also would have precluded the *McConnell* majority from considering future cases (especially by a different party and on additional constitutional grounds) or excluding future as-applied challenges.

Incumbent politicians should not be able to shield themselves from lobbying about upcoming votes in Congress through campaign finance regulations. The people are the sovereign in a republican form of government and have the inherent constitutional right to effectively participate in self-government, which is protected by the First Amendment rights of free expression, association, and petition. Grassroots lobbying by citizen groups is the essence of self-government and has nothing to do with elections. Grassroots lobbying has to do with holding *present* representatives accountable to the people when they are considering the exercise of governmental power. Electioneering has to do with who will be the *future* representatives. Thus, the electioneer-

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[8]This case is not moot for the reasons set out in the *Jurisdictional Statement*. JS 7 & nn.2 & 3.

ing communication prohibition cannot be constitutionally applied to the grassroots lobbying ads in this case or to grassroots lobbying generally.

Argument

I. *McConnell* Did Not, and Could Not, Bar As-Applied Challenges.

May a court in a facial challenge prohibit *all* future as-applied challenges to a statute? May it do so for all time, all parties, all fact situations, and all constitutional claims (even those based on rights not raised in the first case)? And did this Court actually do so in *McConnell*? 540 U.S. 93. WRTL believes not.

A. The FEC Seeks Exclusive Jurisdiction Over As-Applied Questions.

The FEC insists on having the exclusive right to consider and award or withhold as-applied exceptions to the electioneering communications prohibition. Although the FEC may consider as-applied challenges (by rulemaking and advisory opinions), it insists that an Article III court may not do so.

The FEC has authority to create by rulemaking additional exceptions, as applied to specific situations, to the electioneering communications prohibition. 2 U.S.C. § 434(f)(3)(B)(iv). It exercised that authority as applied to *MCFL*-type corporations, 67 Fed. Reg. 65203-07, 65211, over a year before this Court also decided that an as-applied exception to the electioneering communication provision was constitutionally required for certain nonprofit corporations identified in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 264 (1986) ("*MCFL*"). *McConnell*, 540 U.S. at 209-11.

The FEC even considered an exception for grassroots lobbying, then decided that BCRA prohibited the exception. *See* 67 F. Reg. 65203. But BCRA's prime sponsors

proposed such an exception, believing that the FEC had the authority to make it and that such an exception was appropriate. *See infra* at note 19.

And the FEC made an exception when it said, in FEC Advisory Opinion 2004-31, that candidate Russ Darrow, Jr.'s name could be used in what were otherwise electioneering communications by the automobile dealerships bearing his name that were founded by him, but were now under the day-to-day control of his son, Russ Darrow III. *See* JS at 2.

But the FEC insists that an Article III court may not do the same. And the FEC's current insistence is despite its prior insistence in *McConnell* that as-applied challenges were the cure for perceived overbreadth.[9] Now it asserts the diametrically opposed position that the opportunity for such challenges is over, never to return, and the FEC has exclusive jurisdiction over as-applied questions. The FEC is wrong.

B. *Broadrick*, Article III, and Prudential Tenets Require As-Applied Challenges To Be Permitted.

In rejecting a facial challenge to the corporate prohibition on electioneering communications in *McConnell*, this Court cited *Broadrick*, 413 U.S. 601, for the proposition that facial overbreadth must be substantial before a

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[9]In the district court in *McConnell*, the FEC conceded the overbreadth of the electioneering communication provision to be up to six percent, but argued that later as-applied challenges were the only solution for such overbreadth. Redacted Brief of Defendants at 131, 161, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582). In this Court in *McConnell*, the FEC argued the same. Brief for the FEC (Final Version) at 105-06, *McConnell*, 540 U.S. 93 (02-1674). Intervenors Senators McCain and Feingold and other prime BCRA sponsors also argued for leaving as-applied challenges until later. [Redacted] Brief for Intervenors at 64, *McConnell*, 540 U.S. 93 (No. 02-1674).

facial challenge may succeed. *Broadrick* recognized (as did *McConnell* by relying on it) that where a facial challenge fails "whatever overbreadth may exist should be cured through *case-by-case analysis* of the fact situations to which its sanctions, assertedly, *may not be applied.*" *Broadrick,* 413 U.S. at 615-16 (emphasis added).

The availability of as-applied challenges is required by Article III of the U.S. Constitution, which prevents federal courts from deciding cases not before them. *See, e.g.*, Charles Alan Wright, *Law of Federal Courts* at 54-59 (1983). Based on Article III and prudential considerations, this Court has created avoidance principles summarized by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The second Article III-based principle is that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,'" nor will it "'decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *Id.* at 346-47 (citation omitted). The first prudential principle is that "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* at 347 (citation omitted). *McConnell* endorsed these rules[10]

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[10]*McConnell* adhered to these avoidance principles as follows:

> We have long "rigidly adhered" to the tenet "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *United States* v. *Raines*, 362 U.S. 17, 21 (1960) (citation omitted), for "[t]he nature of judicial review constrains us to consider the case that is actually before us," *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., dissenting).

McConnell, 540 U.S. at 192-93.

and could not have decided the present as-applied challenge. It was not before the Court.[11]

C. *McConnell*'s Language Presupposed As-Applied Challenges.

McConnell also specifically indicated that the usual as-applied challenges must be permitted. This Court differentiated between "genuine issue ads" and "sham issue ads," noting that there was an evidentiary dispute as to "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those . . . time spans but had no electioneering purpose," but finding that "the vast majority of ads clearly had such a purpose." *Id.* at 206. The Court acknowledged that "[t]he interests that justify the regulation of campaign speech *might not apply* to the regulation of genuine issue ads," *id.* at 206 n.88 (emphasis added), but this issue was not resolved in *McConnell's* facial analysis. Thus, *some* genuine issue ads were swept up in the prohibition and an as-applied challenge is the proper way to sort them out.

The district court, however, relied on *McConnell's* footnote 73 for the proposition that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge WRTL propounds before us." JS-App. 2a. Footnote 73 noted that there were two definitions of "electioneering communication" in BCRA—the primary one that this Court upheld and a backup definition—but said that the Court did not need to reach the constitutionality of the backup definition because "we uphold all applications of the primary definition and accordingly

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[11]This Court sometimes declares matters nonjusticiable, but that is not at issue here, and the Court clearly articulates when matters are nonjusticiable. *Compare Davis v. Bandemer*, 478 U.S. 109 (1986) (partisan gerrymandering claims held justiciable) *with Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality said nonjusticiable).

have no occasion to discuss the backup definition." 540 U.S. at 190 n.73. The district court misunderstood "all applications" to mean all applications of *the prohibition* of corporate funding of electioneering communications.

But in footnote 73 this Court was considering alternative *definitions* of electioneering communication and the approved primary definition had various *applications in the statute*, i.e., to disclosure requirements for different entities and in different situations, 2 U.S.C. § 434(f), to disclaimer requirements, 2 U.S.C. § 441d, and to the prohibition on the use of corporate or labor union funds. 2 U.S.C. § 441b. The primary definition was upheld in all *these* "applications." As to various *factual* applications of the corporate ban on electioneering communications in *McConnell's facial* challenge, this Court had two choices, either to uphold this provision on its face as to *all* applications (subject to later as-applied challenges), or to strike it down in all its applications, based on whether it's overbreadth was "substantial." The Court chose the former. 540 U.S. at 207.

This would explain this Court's statement in its Title V analysis parenthetically describing the Court's facial upholding of the electioneering communication prohibition as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey a message of support or opposition)." *Id.* at 239 (emphasis in original). By likening *McConnell*'s decision on BCRA § 203 (electioneering communication prohibition) to BCRA § 504 (broadcaster reports), this Court was indicating that as-applied challenges remained open :

> Moreover, candidates (or other speakers) whom § 504 affects adversely in this way (or in other ways) remain free to challenge the lawfulness of FCC implementing regulations and to challenge

> the constitutionality of § 504 as applied. To find that the speech-related interests of candidates and others may be vindicated in an as-applied challenge is not to "ignor[e]" those interests.

540 U.S. at 244.

Demonstrating that as-applied challenges were appropriate, this Court in *McConnell* actually decided the first as-applied challenge, i.e., whether there must be an exception to the prohibition for electioneering communications by *MCFL*-type corporations, which could not be prohibited because they pose none of the corruption risks represented by business corporations. *Id.* at 209-11. *McConnell* nowhere said this could be the only as-applied exception.

In sum, this Court in *McConnell* did not foreclose as-applied challenges to the prohibition on corporate expenditures for electioneering communications. Nor may all future as-applied challenges be precluded. Reason and experience teach that no court can foresee all possible future fact situations that might arise and require the considered constitutional analysis of the federal courts. This Court has often recognized this practical limitation (and the ever-present possibility of future as-applied challenges) with the "on this record" phrase. *See, e.g., Buckley v.* Valeo, 424 U.S. 1, 4, 72 (1976); *MCFL*, 479 U.S. at 252 n.6. Thus, this Court may consider this as-applied challenge.

II. An Exception for Genuine Grassroots Lobbying Is Constitutionally Required.

Should incumbent politicians be able to insulate themselves from lobbying about upcoming votes in Congress through campaign finance regulations? WRTL believes not and seeks relief as to (1) its three broadcast ads specifically *and/or* (2) grassroots lobbying generally.

A. The Constitution Specifically Protects Grassroots Lobbying.

The people are sovereign. U.S. Const. preamble; *Buckley*, 424 U.S. at 14 ("In a republic . . . the people are sovereign . . . ."). In a constitutional republic, government is restricted to the powers expressly granted by the people. U.S. Const. amend. X. The people created legislators to represent them, U.S. Const. art. I, § 1; art. IV, § 4, and amended the Constitution to require that Senators be "elected by the people." U.S. Const. amend. XVII. The people mandated Congress not to restrict their rights to speak, associate,[12] and petition in the exercise of the people's sovereign right to participate in representative self-government. U.S. Const. amend. I.

The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777.

While the individuals who make up WRTL could engage in electioneering communication, 2 U.S.C. § 434(f) (requiring only disclosure if spending exceeds $10,000 in a calendar year), when they form themselves into an effective advocacy group for lobbying, their lobbying

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[12] "[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas . . . ." *Buckley*, 424 U.S. at 16 (citations and quotation indicators omitted).

through broadcast ads is prohibited for up to 90 days during an election year. Citizen groups formed under the right of association are an essential component of democracy in action. In *Buckley*, this Court reaffirmed the constitutional protection for association: "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley*, 424 U.S. at 15."[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25.[13] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic republic by permitting amplified individual speech. *Id.* at 22.

Grassroots lobbying is also protected by rights not considered in *McConnell*, i.e., the inherent right of the people to participate in self-government and the express First Amendment right to petition, along with a line of cases protecting corporations' right to contact both legislators and the public about pending legislative and executive matters.

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[13]When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But when speech is limited, as here, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest, *Buckley*, 424 U.S. at 64-65, the standard employed for expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2001).

The right of corporations to petition both the legislative and executive branches was recognized in *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127, 135 (1961). This Court held that attempts to influence the passage or enforcement of laws were constitutionally protected, essential to representative government, and could not constitute a violation of the Act:

> In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38. *See also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government").

In *Bellotti*, 435 U.S. 765, this Court applied the right of petition to corporations which sought "to publicize their views on a proposed constitutional amendment . . . to be submitted . . . as a ballot question," *id.* at 769, and held that this was constitutionally protected. *Id.* at 776-78, 790-96. *Bellotti* noted that "the First Amendment protects the right of corporations to petition legislative and administrative bodies," and concluded that "there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity." *Id.* at 791 n.31.

The overarching principle of these cases is the right of the people to lobby incumbent politicians about their

conduct in office.[14] Where the express right of petition and the inherent necessity of the people's participation in self-government are added to the rights of free expression and association, the electioneering communication prohibition must yield to the weight of constitutional necessity and allow an exception for grassroots lobbying.

Recently there was a great debate on reforming Social Security. President Bush made speeches across the nation to generate support so that people would pressure their representatives to support his plan. This was grassroots lobbying. Senators, Representatives, and political party leaders similarly tried to sway public opinion for or against the President's viewpoint. The people, through nonprofit corporate citizen groups, also lobbied.[15] This is the work of a vibrant republic, with active involvement of the people. But what if an election were pending within 60 days as this debate occurred?[16]

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[14]It should be noted that the only reason that the present issue about grassroots lobbying arises is because an incumbent politician chooses to run again. Choosing to run for reelection is a benefit to the incumbent, now candidate, because he or she has the possibility (perhaps even the likelihood, given the benefits of incumbency) of being reelected and exercising government power in the future. However, if the electioneering communication provision bans grassroots lobbying, the incumbent's interests are served, but not the people's. In the present case, Sen. Kohl could be lobbied, but not Sen. Feingold. So incumbents who choose to run again gain a special exemption from the attempt by the people to influence them through grassroots lobbying. This goes a step beyond anything considered in *McConnell*. And the problem is compounded because members of Congress often push important legislative matters to the end of the session, which will often be in the blackout period. *See infra* note 16.

[15]For example, AARP was grassroots lobbying against the President's plan. *See* http://www.aarp.org/ (visited March 7, 2005). The 60 Plus Association was grassroots lobbying for the President's plan. *See* http://www.60plus.org/ (visited March 7, 2005).

[16]In *McConnell*, the ACLU provided a summary Chart of "Bills of

(continued...)

All but the people could continue using the most effective means to do grass-roots lobbing—broadcast media.

B. Grassroots Lobbying Differs From Electioneering.

1. There Is a Distinction Between Grassroots Lobbying and Electioneering.

This is the first instance in which this Court has to specifically address the constitutional distinction between grassroots lobbying and electioneering in the context of campaign finance laws because BCRA's electioneering communication prohibition makes no such distinction.

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[16](...continued)
Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." Joint Appendix at 622-26, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*) and made the following observations about pre-election legislative activity:

> [E]lection years are often periods of intense legislative activity, as the district court recognized. During the 2002 election cycle, for instance, legislation creating a new federal Department of Homeland Security was under consideration in the midst of the pre-election period. . . . During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See* [Chart]. Thus, it is not unusual for the ACLU's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election.

Brief of Appellant at 12-13, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*). The Chart is included as an appendix to the *Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant* herein. In addition, the Chamber's brief provides details of the roll call votes in prohibition periods in the 108th Congress. *Id.* at 6. A longstanding practice in Congress is to attach riders to appropriation bills, which are considered in the fall prohibition periods. Movement of controversial legislation to prohibition periods may reasonably be expected because less opposition can be generated at such times.

The Internal Revenue Code, however, does so. The Internal Revenue Code provides that:

> [A] "Grass roots lobbying communication" is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof" and has three "required elements:" (1) "refers to specific legislation," (2) "reflects a view on such legislation," and (3) "encourages the recipient of the communication to take some action with respect to such legislation."

26 U.S.C. § 56.4911-2(b)(2)(i)-(ii). Advocacy groups such as WRTL that are exempt under 26 U.S.C. § 501(c)(4), may spend an unlimited amount of their general treasury funds on lobbying, either "grass roots lobbying" or legislative lobbying.[17] Charities exempt under 26 U.S.C. § 501(c)(3), however, may spend only an insubstantial amount on lobbying of any kind.

Under the IRC, electioneering is referred to as "political intervention" and is more severely restricted. Nonprofit corporations under § 501(c)(3) may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office," *id.*,[18] while advocacy groups under § 501(c)(4) may do so, but may spend only an insubstantial amount on

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[17]"Grass roots lobbying" includes "(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof," while "legislative lobbying" refers to "(B) any attempt to influence any legislation through communication with any member or employee of a legislative body or with any government official or employee who may participate in the formulation of the legislation." 11 C.F.R. § 4911(d)(1).

[18]The unique problems that the prohibition imposes on § 501(c)(3) groups, with respect to grassroots lobbying, are addressed in the present case by the *Brief of OMB Watch [et al.] as Amici Curiae in Support of Appellant.*

political intervention. Political intervention is dealt with under the term of "exempt function," in 26 U.S.C. § 527(e)(2), and:

> means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

So the IRC distinguishes between lobbying, which is seeking to influence legislation, and political intervention, which is seeking to influence elections.

While the term "influencing" has not been construed in the IRC context, FECA contains a similar definition of electioneering by defining political "contributions" and "expenditures" as ones made "for the purpose of influencing any election for Federal office." 2 U.S.C.§§ 431(8)(A)(i) and 431(9)(A)(i). Because of the vagueness and potential overbreadth of this phrase, this Court has construed "influence" to require express advocacy of the election or defeat of a clearly identified candidate. *Buckley*, 424 U.S. at 79-80 (construing "purpose of influencing," in §§ 431(8) and (9), to require express advocacy), and *McConnell*, 540 U.S. at 190-92. *See also Buckley*, 424 U.S. at 42-44 (construing "relative to" to require express advocacy) and *MCFL*, 479 U.S. at 248-49 (construing "in connection with an election," in the prohibition at § 441b, to require express advocacy). As a result of these constructions, FECA clearly applied only to electioneering and not grassroots lobbying prior to enactment of BCRA.

Central to these "express advocacy" holdings, and to the speech protections of the First Amendment generally, was the idea that the *speaker* must be able to know,

based on the meaning of the words he is speaking, which side of the line the speaker is on. Requiring "explicit words" of advocacy of the election or defeat of a candidate does this. *Buckley*, 424 U.S. at 43. Thus, the speaker is not left to "hedge and trim," wondering how the hearer might interpret the message based on factors external to the communication itself. *Id. McConnell* endorsed the express advocacy construction of the language at issue in *Buckley* and *MCFL* to avoid vagueness and overbreadth. 540 U.S. at 192.

BCRA added the electioneering communication provision, which applies to certain communications that "refer[] to a clearly identified candidate for Federal office," without any further content requirements. 2 U.S.C. § 434(f)(3)(A)(i)(1). *McConnell* upheld this provision on its face because it was not vague or overbroad. 540 U.S. at 194. It was not vague because "clearly identifying a candidate" is not vague. *Id.* (quoting definition). And it was not overbroad because electioneering communications generally were found to be the "functional equivalent of express advocacy." *Id.* at 206. However, since effective grassroots lobbying requires reference to an incumbent, who may be a candidate, this provision, on its face, encompasses grassroots lobbying, and this case presents the need to distinguish, for purposes of campaign finance laws, between grassroots lobbying and electioneering.

The distinction between grassroots lobbying and electioneering has been discussed in campaign finance cases, but has not yet been definitively decided. Justice Stevens raised the distinction in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), where he said that "there is a vast difference between *lobbying* and debating public issues on the one hand, and political campaigns for election to public office on the other." *Id* .

at 678 (Stevens, J., concurring) (emphasis added). Justice Stevens' view seems to have been carried over to his opinion for the Court in *McConnell* where, in footnote 88, the Court reiterated that, while government may regulate electioneering, it may not regulate "genuine issue ads" and distinguished *McConnell* from *Bellotti*, 435 U.S. 765, and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). *McConnell*, 540 U.S. at 206 n.88. Justice Kennedy, moreover, argued in *McConnell* that corporations ought to be able to do both electioneering and lobbying. 540 U.S. at 764 (Kennedy, J., dissenting).[19]

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[19]The BCRA prime sponsors saw the difference between electioneering and grassroots lobbying, proposing to the FEC the following exception to the prohibition on electioneering communications:

> The term "electioneering communication" does not include any communication that:
>
> ****
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.
>
> (B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords at 10 (copy on file with authors) (attached to Letter from Sen. John

(continued...)

2. Genuine Grassroots Lobbying Is Not Sham Issue Advertising.

McConnell said that the "constitutionally adequate justification" for upholding the electioneering communication prohibition was that the "sham issue ads" considered there were the "functional equivalent of express advocacy." 540 U.S. at 206. So the issue here is whether grassroots lobbying ads equate to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. Or is grassroots lobbying a "genuine issue ad" which may not be prohibited.

Grassroots lobbying ads are not "sham issue ads" and have nothing to do with elections. They are about legislative action and effective participation by the people in self-government. Lobbying seeks to influence the exercise of government power by incumbent officeholders today, while electioneering seeks to influence who will exercise governmental power in the future. The people's right to influence their representatives on pending legislative matters today is more pressing and potentially more

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[19](...continued)
McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC (Aug. 23, 2002) (copy on file with authors). Both documents are available at the FEC's website, http://www.fec.gov/law/RulemakingArchive.shtml (select "Electioneering Communications" then "Comments on This Rulemaking").

This proposal by the prime sponsors brings the issue to a very fine point: Assuming a grassroots exception that clearly identifies a candidate, e.g., "Your Senator," is there a constitutional justification for forbidding a citizen group to simply name its Senator? Is the incremental burden on the citizen group narrowly tailored to a compelling interest? Naming the candidate is necessary, as Judge Leon noted from the *McConnell* record, *infra* at note 31, and is easily justifiable on the basis of the people's exercise of their sovereignty in a republican form of government and their express right to petition, which includes grassroots lobbying.

important than who might be their representative next year.

Further, if this Court were to accept the proposition that the people may be silenced now on upcoming votes in Congress because it might affect future elections, where would it end? Based on such a proposition, grassroots lobbying could be banned at all times because it might always have a remote effect on elections. There would be no constitutional way to limit such a ban to 30 plus 60 days in a year, or the 80 unbroken days in this case.

Throughout the *McConnell* litigation, grassroots lobbying was perceived as different in kind from electioneering. Judge Leon, the controlling vote in the district court, clearly thought that grassroots lobbying must be excluded from the "sham issue ad" category. He found that grassroots lobbying did not support or oppose candidates, declaring that his approach to the electioneering communication definition

> assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, *genuine issue advocacy, specifically of the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. See* Findings 368-73 (providing examples of legislation-centered advertisements that do

> not promote, support, attack, or oppose the election of a federal candidate).

McConnell, 251 F. Supp. 2d at 802-03 (Opinion of Judge Leon) (emphasis added except as to "*unrelated*"). Up to 17% of the ads for which the *McConnell* district court did fact finding were "genuine issue ads" (in which Judge Leon included grassroots lobbying), with possibly more genuine ads in years with more hot-button legislative issues. *Id.* at 798-99.[20]

3. Grassroots Lobbying Does Not Implicate *McConnell*'s Concerns.

Grassroots lobbying does not implicate *McConnell*'s expressed concerns about "sham issue advocacy." 540 U.S. at 132. *McConnell* clearly identified what the Court meant by that term, beginning with a section entitled "Issue Advertising." *Id.* at 126.

First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples), 196-97 ("concealing their identities," "dubious and misleading names").

Second, the Court noted that "sham issue ads" closely resembled express advocacy ads. Both such ads and express advocacy ads "were used to advocate the election or defeat of clearly identified federal candidates," *id.* at 126, and *McConnell* provided an immediate example of what the Court meant by that: "Little difference existed, for example, between an ad that urged viewers to 'vote

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[20]The *Brief of Alliance for Justice, as Amicus Curiae In Support of Appellant* herein provides a number of concrete examples of ads that would not be "sham" ads if run during prohibition periods. *See id.* at Part II.A. Other examples are in the *Brief Amicus Curiae of the American Civil Liberties Union in Support of Appellant* at Part I.

against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 126-27. In its discussion of BCRA Title II, the Court returned to this aspect of "sham issue ads" with this example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> > "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." 5 1998 Senate Report 6305 (minority views).
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

540 U.S. at 193 n.78. This Court approved BCRA's solution of requiring disclosure and eliminating the use of corporate or labor union money for such ads, except as applied to *MCFL*-type corporations, which could not be prohibited from using corporate money for "electioneering communications" because such corporations do not pose the corruption risks represented by business corporations. *Id.* at 209-11 (creating the first as-applied exception to the prohibition).

Grassroots lobbying ads implicate none of these concerns. Because WRTL does not challenge the dis-

claimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The whole system would be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue. And to the extent there is a scintilla of perceived support or opposition to a candidate, a remote possibility necessitated by the people's sovereign right to participate in representative government, the people, with full disclosure as to the messenger, can make the ultimate judgment. "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 792 n.31 ("The First Amendment rejects the 'highly 'paternalistic' approach . . . .").

And there will be no ads resembling express advocacy or the "sham ads" that the Court found to be "functional equivalents." *Id.* at 206. As may be seen in the samples offered by WRTL, grassroots lobbying ads focus on passing or defeating pending legislation, not electioneering, and are of no (or only de minimis) value for the purposes of opposing or supporting candidates. But they are essential to self-government.

Further, the desirability of a "bright-line rule" does not defeat this as-applied challenge. This Court has already decided that where constitutional justification is absent, the "desire for a bright-line rule. . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL* , 479 U.S. at 263 (emphasis in original).[21]

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[21]In any event, the Court could adopt a bright-line test for grassroots lobbying that is every bit as bright as the exception for

(continued...)

4. If There Are Residual Concerns about Using Corporate General Treasury Funds for Grassroots Lobbying, a Segregated Bank Account Could Be Used.

The one possibly perceived residual advantage of requiring WRTL to do its grassroots lobbying through a PAC is that the use of donated corporate money would be eliminated.[22] In its strict scrutiny analysis, this Court in *McConnell* relied on the interest in regulating corporations with respect to candidate elections for the compelling interest prong. 540 U.S. at 205 (both "corporate form" advantage and "circumvention" are mentioned, but only as to "electoral involvement," which is absent here).

There is no "corporate form" compelling interest with respect to petitioning government (and consequently no "circumvention" interest), because corporate money may constitutionally be used for petitioning legislative and executive branches and the public about legislation. *See supra* at 18-18. Strict scrutiny requires a sufficient nexus between the sort of grassroots lobbying herein and candidate elections for the compelling interest in regulating corporations applicable to candidate elections to even

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[21](...continued)
MCFL-type corporations created in *MCFL*. *Id.* at 263-64. The sort of "genuine issue ads" that constitute grassroots lobbying can be neatly cabined without placing any burden on the courts or the FEC.

[22]The PAC option would also impose a $5,000 annual contribution limit on donations to the PAC, but contribution limits on organizations engaged in lobbying to support or oppose ballot measures (i.e., legislation) violates First Amendment rights of expression and association. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). Given the extremely low likelihood that genuine grassroots lobbying would have a cognizable effect on an election, and given the offsetting self-governance interest of the people, there is no constitutional justification for contribution limits in this context.

apply. There is, however, an insufficient nexus here.[23] So there is no compelling interest to justify applying the prohibition on use of corporate funds to grassroots lobbying.

There is also no compelling interest in regulating corporations even as to candidate elections with respect to *MCFL*-type corporations. Although WRTL does not qualify for the exception to the prohibition (11 C.F.R. § 114.2(b)(2)) as a "qualified nonprofit corporation,"under the strict wording of 11 C.F.R. § 114.10,[24] Record 30:6 (*AVC* ¶ 23); JS-App. 4a (FOF 3), WRTL is in fact quite like an *MCFL*-type corporation because it is an ideological, nonstock, nonprofit (§ 501(c)(4)) corporation. Record 30:6 (*AVC* ¶¶ 20, 22); JS-App. 4a (FOF 1).

The fact that a corporation does not meet "qualified nonprofit corporation" status, because of some minimal business activity or receipts from corporations, should not matter for present purposes, however, because corporate money may be used for grassroots lobbying anyway. *See* 18. So the lack of corruption threat attributed to *MCFL*-

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[23] *See, e.g., Riley v. National Federation of the Blind*, 487 U.S. 781, 793 & n.7 (1988) ("there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent" and "[e]ven if percentages are not completely irrelevant to the question of fraud, their relationship to the question is at best tenuous").

[24] 11 C.F.R. § 114.10(c) follows, in a somewhat wooden way, the requirements for the *MCFL*-type corporation created by this Court in *MCFL*, 479 U.S. at 263-64, by creating an exception for ideological, nonstock, nonprofit (§ 501(c)(4)) corporations that have no business income and receive no corporate contributions. The regulation makes no provision for de minimis business income (especially of the sort related to the organization's mission, e.g., book sales related to its issues) or de minimis corporate contributions, as have other federal courts. *See* note 34 (listing cases recognizing corporations as *MCFL*-type despite such de minimis activity).

type corporations should be attributed to WRTL, even if it has receipts from business corporations.

Alternatively, WRTL would be willing to make disbursements for electioneering communications only "out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens, nationals, or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications." 2 U.S.C. § 434(f)(2)(E); 11 C.F.R. § 104.20(c)(7). This would eliminate all concerns about the use of business corporation funds for electioneering communications. As noted in the complaint, Record 30:13 (*AVC* at ¶ 67):

> The only remaining restrictions on PACs that would not apply to disbursements for grass-roots lobbying electioneering communications made from a segregated bank account are (a) the annual PAC contribution limit and (b) the requirement that a corporation first acquire "members" and then solicit funds only from these members. 2 U.S.C. § 441b(b)(4)(C). But as noted above, contribution limits are unconstitutional in the context of grass-roots lobbying because there is no potential for corruption, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), and any donors contributing in excess of $1,000 to the account would be disclosed to the public.[25]

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[25]Further discussion of this alternative may be found in the *Brief of Alliance for Justice, as Amicus Curiae in Support of Appellant* herein at Parts III and V. The *Brief Amicus Curiae of the American Civil Liberties Union in Support of Appellant* also discusses this alternative at Part II.C.

C. WRTL's Ads Are Not Electioneering.

1. WRTL's Ads Are Not the "Functional Equivalent of Express Advocacy."

Furthermore, WRTL's three grassroots lobbying ads[26] are not express advocacy or its functional equivalent. In making this determination, the text of the ads themselves must be examined, not external factors. *Buckley*, 423 U.S. at 43 (express advocacy is "limited to *communications* that include *explicit words* of advocacy . . ." (emphasis added)). The ads do not, of course, contain explicit words expressly advocating the election or defeat of a clearly identified candidate, nor are they the functional equivalent.

The sole focus of the ads was imminently pending, specific legislative activity while Congress was in session, the timing of which was beyond the control of WRTL. The ads asked for calls to *incumbent* Senators who clearly had power to immediately affect the filibuster activity. These are unlike the "sham issue ads" that ask hearers to call candidates, even non-incumbents, about something vague, abstract, unfocused, and/or possibly in the past.

The only reference to Sen. Feingold was in the closing call to his constituents to contact him and ask him to oppose the filibusters. As Judge Leon noted, even the *McConnell* defendants' own expert concluded that an ad mentioning a candidate's name is a genuine issue ad, if "the body of the ad has no referent to [a candidate] whatsoever [and] the only referent to [the candidate] is the call line." 251 F. Supp. at 795.

WRTL's ads asked constituents to call *both* Sen. Kohl and Sen. Feingold, lessening the focus on Sen. Feingold

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[26]Note 4, *supra*, discusses details about of the current ads that indicate that they are genuine grassroots lobbying communications, i.e., pure issue ads, and not electioneering.

even more and indicating that the issue was filibustering, not Sen. Feingold. The ads mentioned no election, candidacy, or political party, and said nothing about the Senators' character, actions, or fitness for office. The ads didn't even say whether the Senators had both supported or opposed the filibuster or split on the issue. There were no words that promoted, supported, opposed, or attacked either Senator.

The ads dealt with non-candidate Kohl and candidate Feingold equally, not singling Sen. Feingold out in any way. The ads dealt with a long-time, natural concern for WRTL, which would like President Bush's judicial nominees to be appointed, so there is no question of a made-up issue. In fact, WRTL ran these same ads outside the blackout periods during which time there is no congressional or court finding that there is any equivalence with express advocacy. And the ads dealt with an unprecedented issue of vital national importance that was just then coming to a head at the end of the terms of President Bush and the Congress, which facts were a matter of public record and beyond WRTL's control.

In sum, WRTL's ads were not of the "functional equivalent of express advocacy." Prohibiting WRTL from running them with its general treasury funds would therefore be unconstitutional.[27]

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[27]The unique details of WRTL's ads do not reach the outer limits of what the Constitution requires. For example, WRTL believes that there is no constitutional justification for prohibiting a citizen group from stating a legislator's position (for, against, or undecided) on a pending legislative matter in a grassroots lobbying communication.

But such questions are not necessary to decide on this record, although the Court may wish to cite them if the Court finds them essential to its decision in the manner that it did in *MCFL*. 479 U.S. at 263-64. But even without so doing, subsequent as-applied cases could refine the scope of the constitutional protection in finer detail in the same way that lower courts have found that de minimis

(continued...)

2. Other Activity Does Not Create Functional Equivalence.

The district court said that, even if it could consider an as-applied challenge, it could also consider whether the proposed ads would affect elections by looking at external factors, and WRTL would lose because it was really just trying to defeat one of the two senators named. JS-App. 8a-9a.

The district court found, JS-App. 9a, that "candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue," JS-App. 5a (FOF 5), WRTL-PAC "endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority," JS-App. 5a (FOF 7), "[i]n a news release . . . WRTL criticized Senator Feingold's record on Senate filibusters against judicial nominees," JS-App. 5a (FOF 8), "WRTL has used a variety of non-broadcast communications to convey its criticisms of Senate filibusters against judicial nominees in the months leading up to August 2004." JS-App. 51 (FOF 9).

The district Court said in effect that if you exercise one constitutional freedom, such as speaking out on a public issue or using a PAC to oppose a candidate, then you give up your constitutional right to do grassroots lobbying. That is an unconstitutional condition, i.e., if you want this benefit you must give up that right (*see, e.g., Healy v. James*, 408 U.S. 169, 180-84 (1972); *Speiser v.*

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[27](...continued)
business income or corporate donations do not prevent a corporation from qualifying as an *MCFL*-type corporation if they would otherwise qualify. *See FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *FEC v. Survival Educ. Fund*, 65 F.3d 285, 292 (2d Cir. 1995); *Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994).

Randall, 357 U.S. 513, 518 (1958)), in this case requiring a tradeoff of constitutional rights instead of benefits. The district court also said in effect that if you think you may ever want to participate in representative government by petitioning your representative, make certain you never say anything about the issue first, make sure your PAC never supports or opposes any of your representatives, and if you want to make an issue of something that other people care about, so that it becomes a campaign issue, forget it.

This position is hostile to the rights of free expression, association, and petition, and to a republican form of government and would seriously undermine the ability of the people to participate in their government. And the very fact that an incumbent candidate makes a pending legislative action a campaign issue, using the bully pulpit of public attention resulting from his or her candidacy, increases, rather than diminishes, the constitutional interest of the people in participating in that public debate. Candidates may not be granted a veto over the people's right to lobby incumbent politicians about upcoming votes in Congress by making that issue a campaign issue.

The district court's position is also contrary to clearly-established law, which defines both independent expenditures and electioneering communications based on what the communication itself says, not on what the organization says elsewhere, or what its PAC says, or what else an organization does. These are considered in turn.

An independent expenditure is determined by looking to the communication itself, not extrinsic factors. "'Independent expenditure' means an [uncoordinated] expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate . . . ." 2 U.S.C. § 431(17). "'Clearly identified' means that—(A) the name

of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. § 431(18). So whether a communication constitutes an independent expenditure turns solely on whether the communication *itself* contains explicit words expressly advocating a clearly identified candidate's election or defeat. What an organization's PAC said, what the organization's press releases said, and whether some candidate cares about the same issue so as to make it a campaign issue are not part of the analysis. There is express advocacy, or there is not, based on the communication itself. *Buckley*, 423 U.S. at 43 (express advocacy "limited to communications that include explicit words of advocacy . . . .").

As to electioneering communications, the law again requires examination of the communication itself, not extrinsic factors. "Electioneering communication" is defined as a "communication" meeting certain criteria. 2 U.S.C. § 434(f)(3). *See* JS-App. 19a-21a; *see also* JS-App. 24a (regulatory definition, 11 C.F.R. § 100.29). Nowhere in the definition is there any instruction to see whether the organization's PAC said anything or what the organization's press releases said. In fact, *McConnell* upheld the definition because it introduced none of the vagueness posed by the statute at issue in *Buckley*. *McConnell*, 540 U.S. at 192, 194. The problem identified in *Buckley* was how to separate electioneering from participatory democracy. *Buckley* noted that "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." 424 U.S. at 42. And this Court pointed out that there could not be a test that depended on the hearers' subjective judgment:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker,

> in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (internal quotation marks and citation omitted).

As to PAC activity, the very statutory *prohibition* at issue in this case, expressly *excludes* any consideration of PAC activity in determining whether a corporation has made an independent expenditure or an electioneering communication. 2 U.S.C. § 441b(b)(2)(C) ("*shall not include* . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" (emphasis added)). The courts have never held that what a citizen group says through a PAC is attributable to its connected corporation or is a factor in determining whether a communication made with general treasury funds constitutes express advocacy, or its functional equivalent.

In *MCFL*, MCFL had a PAC, 479 U.S. at 255 n.8, but this Court never asked what the PAC had said or done in its analysis of whether MCFL's communication contained express advocacy. *Id.* at 249. MCFL had engaged in various legislation-oriented activities, including grassroots lobbying. *Id.* at 242. But this Court never considered any such activity in determining whether there was an independent expenditure. Instead the Court noted that the "Special Edition" of MCFL's *newsletter* said to vote prolife and then identified which candidates were prolife. *Id.* at 249. So the Court said that if A=B and B=C, then A=C. But the sole focus was on the particular *communication* in the newsletter and what its words said, not MCFL's other activities.

If what a PAC says is attributable to a connected corporation itself, then every PAC's independent expenditure and electioneering communication would constitute a violation *by the corporation* of the prohibition on corporate independent expenditures and electioneering communications at 2 U.S.C. § 441b. The PAC is legally and logically separate from the corporation. It's actions are not attributable to its connected corporation.

Buckley and *McConnell* both stand for the proposition that express advocacy and its functional equivalent must be determined by a bright-line test to protect fundamental freedoms and core functions of participatory democracy. There can be no vagueness, and introducing external factors, such as things said in an unrelated prior press release, reintroduces vagueness.

D. Other Options Are Inadequate.

The district court acknowledged that the loss of First Amendment freedoms is irreparable harm, but declared that the harm "is not nearly so great as plaintiff argues" because other means of communication are open and there is the option to use PAC funds. JS-App. 9a-10a.

1. The PAC Option Imposes an Unconstitutional Burden on Grassroots Lobbying.

Of course, Congress may tell WRTL how to run its ads only if the electioneering communication prohibition is narrowly tailored to a compelling state interest *as applied* to grassroots lobbying. Until that is demonstrated, and the burden for demonstrating it is on the FEC, *see Austin*, 494 U.S. at 657-58, WRTL is constitutionally harmed if it must confine itself to PAC funds.[28]

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[28]The FEC argued below that *McConnell* held that a PAC option was a constitutionally sufficient means for corporations to pay for

(continued...)

The district court also said that *McConnell* "has already determined that the provisions of the BCRA serve compelling government interests." JS-App. 11a. That was as-applied to sham issue ads, not grassroots lobbying. As noted above, *supra* at 18, corporations are free to engage in lobbying, so the exclusion of corporate funds is not a compelling interest as to grassroots lobbying. Since WRTL challenges only the prohibition, not the disclaimer and disclosure requirements relating to electioneering communications, the public would be fully informed.

Moreover, on the facts of this as-applied case, the PAC alternative is simply inadequate. WRTL had only a

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[28](...continued)
election-related advocacy, but that assertion ignores the fact that *McConnell* never held that "genuine issue advocacy" in the form of grassroots lobbying constitutes election-related advocacy. Rather, *McConnell* applied *Broadrick*'s substantial overbreadth facial-challenge test and left for another day the sort of as-applied challenge brought today. To the extent that *McConnell* considered the PAC option sufficient, it did so only in the context of the "sham issue ads" that it considered to be the "functional equivalent of express advocacy," which is not the case with the present ads.

The district court's reliance, JS-App. 10a, on *FEC v. Beaumont*, 539 U.S. 146 (2003), was wholly inapposite because *Beaumont* only said that the PAC option was adequate with respect to contributions, for which this Court has always applied a lower standard. By contrast, in *MCFL* , the Court said that the PAC option was not adequate with respect to independent expenditures (containing express advocacy) for *MCFL*-type corporations and catalogued some of the burdens inherent in PAC funding. *MCFL*, 479 U.S. at 252-55. Justice O'Connor concurred, highlighting especially the PAC-option burdens on MCFL. *Id.* at 265 (O'Connor, J., concurring) *Austin* also noted that requiring the PAC option is a burden on First Amendment rights that must be narrowly tailored to a compelling governmental interest. *Austin*, 494 U.S. at 657-58. Applying the PAC option to WRTL's proposed ads, or to grassroots lobbying generally, is not narrowly tailored to a compelling governmental interest. The FEC has failed its burden to prove it so under strict scrutiny.

limited time to engage in grassroots lobbying in favor of an up-or-down vote on judicial nominees. A lost opportunity at the critical time is an opportunity lost forever. These were highly important matters to WRTL and its members and were not "mere" theoretical deprivations of First Amendment rights to speak on matters of public concern.

When a legislative issue arises on short notice, as it did here, there simply is no time for corporations without a PAC to organize one, go through the time-consuming, cumbersome process of first acquiring FECA-compliant "members" (who must fit certain criteria to qualify for solicitation and may not be solicited for PAC money until they respond to a prior solicitation to become members of the organization and the organization responds indicating acceptance)[29] and then raise PAC money from the members through the multiple appeals required for successful fundraising. Record 20:3 (*Lyons Affid.* ¶ 9).

And even though WRTL had a PAC already, the PAC alternative was untenable for there was inadequate time to raise sufficient funds by appeals to existing members (usually multiple efforts are required), *id.*, and taking the

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[29]A "membership corporation," 11 C.F.R. § 114.1(e)(1), such as WRTL, may not solicit contributions to its PAC from non-members (unless they are "executive or administrative personnel, and their families"). 11 C.F.R. § 114.7(a). To acquire "members," a membership corporation must comply with 11 C.F.R. § 114.1(e)(1), i.e., have a prescribed organizational structure, have prescribed language in its organic documents, "expressly solicit[] persons to become members," and "expressly acknowledge[] the acceptance of membership," and comply with § 114.1(e)(2), i.e., the member must have "some significant financial attachment to the membership organization" (described), or "pay membership dues at least annually," or "have a significant organizational attachment to the membership organization" (described). While a membership corporation may solicit members as desired, other corporations may only solicit their employees for a PAC contribution twice a year. 11 C.F.R. § 114.6.

multi-step process of recruiting new members, expressly acknowledging their acceptance as members, and then soliciting them for contributions. *See supra* note 29. The PAC alternative in such situations is effectively a complete ban and also amounts to having to obtain an advance government license before being permitted to speak, which is a prior restraint. And as discussed above, the governmental interests advanced by use of a PAC are inapplicable on the facts of this as-applied challenge.[30]

2. Other Forms of Communication Are Inadequate.

Other alternatives, such as newspaper ads and letters, are also inadequate. The obvious reason why Congress banned only broadcast electioneering communications ads is that they are the most effective, which is why WRTL chose broadcast ads. Barbara Lyons, the long-time executive director of WRTL, Record 30:15 (*AVC* verification statement) with many years of experience in promoting WRTL's issues, verified that broadcast advertising is the most effective means of grassroots lobbying for WRTL and that "non-broadcast communications would not provide WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message." Record 30:10 (*AVC* ¶ 51). The FEC has not shown otherwise, and it is not the role of government to tell citizens how best to communicate: "The First Amendment protects [WRTL's] right not only to advocate [it's] cause but also to select what [it] believe[s] to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). The most effective means of reaching constituents quickly (often on very short notice as legislative issues arise

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[30]As discussed in *Brief of OMB Watch [et al.] as Amici Curiae in Support of Appellant*, nonprofits organized under IRC § 501(c)(3) are not permitted to even have a PAC, making grassroots lobbying in prohibition periods a total and absolute ban for them.

abruptly, e.g., by amendment to an existing bill) and getting their attention is by broadcast ads on their favorite shows and commuting programs, not in dwindling-circulation newspapers and time-consuming direct mail.

3. Requiring That a Group Not Incorporate Burdens the Freedom of Association.

The most effective means of gathering, analyzing, and disseminating the necessary legislative information is through citizen watchdog groups created by the people. *See Buckley*, 424 U.S. at 22 (association permits amplified speech). The most effective form of existence for these groups is the nonprofit corporate form, not to amass business income, which nonprofits do not do, but to facilitate capable leadership by protecting directors and officers from individual liability for acts of the group. Conditioning one's right to do grassroots lobbying on not incorporating imposes a significant obstacle to the group's speech, association and petition activities.

4. Other Times Are Inadequate.

Requiring grassroots lobbying to be conducted before the blackout periods severely compromises the effectiveness of the lobbying. If it is a week before a crucial legislative vote, there is no other available time than that week in which the people can receive the necessary information when it matters.

5. Not Naming a Candidate Is Inadequate.

Grassroots lobbying is ineffective without telling constituents to whom their call should be made. Often, only one or two members of Congress in a state have a position on legislation that differs from others and so would be the object of grassroots lobbying. And many citizens do not know the names of their members of

Congress, so would not know whom to call. A statute requiring that grassroots lobbying ads ask listeners to simply "Call your member of Congress," without naming the legislator needing calls, would render grass-lobbying ineffective.[31]

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[31]Judge Leon singled out grassroots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations:

> The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293.

McConnell, 251 F. Supp. 2d at 794 (emphasis in original).

Conclusion

McConnell did not, could not, eliminate as-applied challenges to BCRA's electioneering communication prohibition. Grassroots lobbying is essential to a republican form of self-government and poses none of the constitutional concerns identified in *McConnell*. It is different in kind from the "sham issue ads" considered in *McConnell* and is not the functional equivalent of express advocacy. So the people may not be prohibited from employing the most effective means to lobby their members of Congress about upcoming votes. Further, on these facts, the prohibition "does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights." *Citizens Against Rent Control*, 454 U.S. at 299. "Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

As a result, this Court should find the electioneering communication prohibition unconstitutional as applied to grassroots lobbying generally, or as applied to the three broadcast advertisements here. Alternatively, the prohibition should be declared unconstitutional as applied, if made with disbursements from a segregated bank account as described in 2 U.S.C. § 434(f)(2)(E) (donations only from individuals) . The case should be remanded for entrance of an appropriate injunction.

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In the Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

Whether the three-judge district court correctly rejected appellant's as-applied constitutional challenge to the federal prohibition on the use of corporate treasury funds to finance "electioneering communications."

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FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion and order of the district court dismissing appellant's complaint (J.S. App. 1a-3a) is unreported. A prior opinion of the district court denying appellant's request for preliminary injunctive relief (J.S. App. 4a-12a) is unreported.

JURISDICTION

The judgment of the district court was entered on May 10, 2005. A notice of appeal was filed on May 12, 2005, and was docketed on May 25, 2005. The jurisdictional statement was filed on May 23, 2005. This Court noted probable jurisdiction on September 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1253 and on the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATEMENT

This case concerns a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA or Act), Pub. L. No. 107-155, § 203, 116 Stat. 81, 91-92, that prohibits corporations from using their general treasury funds to pay for any communication—an "electioneering communication" in the terminology of the Act—that refers to a candidate for federal office and is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 2 U.S.C. 441b(b)(2) (Supp. II 2002). Just two Terms ago, this Court sustained BCRA § 203 against a facial challenge and held that the primary definition of "electioneering communication" set forth in BCRA § 201(a)—which, the Court recognized, has a degree of prophylaxis—is constitutional in "all applications." *McConnell* v. *FEC*, 540 U.S. 93, 190 n.73, 203-209 (2003).

Appellant subsequently filed this action in federal district court, arguing that BCRA's restrictions on the corporate financing of "electioneering communications" are unconstitutional as applied to appellant's own broadcast advertisements. The three-judge district court unanimously denied appellant's request for preliminary injunctive relief, J.S. App. 4a-12a, and the court subsequently dismissed appellant's complaint, *id.* at 1a-3a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431-455 (2000 & Supp. II 2002), and other federal campaign-finance statutes. See J.S. App. 4a. The Commission is empowered to "formulate policy" with

respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. II 2002); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and nonprofit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (Supp. II 2002). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and by the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used to pay for independent expenditures to communi-

cate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210 ("Our decision in *MCFL* related to a carefully defined category of entities."); 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omitted). To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that ex-

pressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (2000) (pre-BCRA version).

The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52. "[T]hose examples eventually gave rise to what [became] known as the 'magic words' requirement," *McConnell*, 540 U.S. at 191, under which communications not using such terms were frequently held not to be covered by federal restrictions on corporate election-related expenditures. The Court in *Buckley* "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons," *MCFL*, 479 U.S. at 249, thereby providing clear guidance to potential advertisers and avoiding undue inhibition of issue-related speech that is not intended to influence federal elections. See *McConnell*, 540 U.S. at 190-192; *Buckley*, 424 U.S. at 78-80.

b. Based on its assessment of evolving federal campaign practices, Congress subsequently determined that the "express advocacy" test had failed to provide an effective standard for distinguishing broadcast advertisements that are intended to influence federal elections from those that are not, at least during the periods immediately preceding federal elections. See

McConnell, 540 U.S. at 126-129, 193-194.[1] That was so for two basic reasons.

First, modern-day advertising professionals generally agree that the use of explicit words of electoral advocacy is rarely an effective means of persuasion. As the Court in *McConnell* explained, "campaign professionals testified [in that case] that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words." 540 U.S. at 127; see *id.* at 127 n.18 (noting that only 4-5% of *candidate* advertisements in recent election cycles used magic words despite the absence of any regulatory incentive to avoid such language); *id.* at 193 & n.77. Indeed, as the Court in *McConnell* noted, one consultant in the field dismissed such appeals as "vote for" and "vote against" as "clumsy words," best to be avoided. *Ibid.* Advertisers who seek to influence federal elections therefore would rarely employ such explicit appeals even if the decision to do so carried no legal consequences, and a regulation focusing on such words would miss its target.

Second, the very existence of the "express advocacy" test—*i.e.*, the fact that communications contain-

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[1] Congress's concern about the inadequacy of the "express advocacy" test focused on broadcast electioneering advertisements aired during brief pre-election periods. See *McConnell*, 540 U.S. at 127 ("[T]he conclusion that [purported issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."). BCRA did not alter the application of the "express advocacy" standard to corporate and union disbursements for non-broadcast communications during those pre-election periods, or to any communication made outside the temporal and geographic limits incorporated into the definition of "electioneering communication." See 2 U.S.C. 431(17) (Supp. II 2002); 11 C.F.R. 100.22.

ing express advocacy of a federal candidate's election or defeat were subject to distinct legal restrictions, including Section 441b's prohibition on the use of corporate and union treasury funds to finance election-related "expenditures"—created an additional incentive for corporations and labor unions to craft advertisements that were broadcast shortly before federal elections and were designed to affect electoral outcomes, but that did not use explicit words of electoral advocacy. Corporations and labor unions therefore devised political communications that avoided such advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *McConnell*, 540 U.S. at 127. Those advertisements "were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money." *Id.* at 128. "[A]lthough the resulting advertisements [did] not urge the viewer to vote for or against a candidate in so many words, they [were] no less clearly intended to influence the election." *Id.* at 193. "[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

After years of debate and extensive hearings, "Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (Supp. II 2002). The term "electioneering

communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) "refers to a clearly identified candidate for Federal office"; (2) is made within 60 days before a general election, or within 30 days before a primary election, for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88, 2 U.S.C. 434(f)(3)(A)(i) (Supp. II 2002).[2]

BCRA also contains a "backup" definition of the term "electioneering communication" that takes effect if the primary definition "is held to be constitutionally insufficient by final judicial decision to support the regulation provided [in BCRA]." 2 U.S.C. 434(f)(3)(A)(ii) (Supp. II 2002); see *McConnell*, 540 U.S. at 190 n.73. Under the backup definition, "the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for [a federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." 2 U.S.C. 434(f)(3)(A)(ii) (Supp. II

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[2] BCRA excludes from that definition (i) a communication appearing in a news story, commentary, or editorial by a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the FECA; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), 2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. II 2002). The definition of "electioneering communication" also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207. Those modes of communication remain subject to the "express advocacy" test. See note 1, *supra*.

2002). Unlike the primary definition, the applicability of the backup definition is not limited to broadcast advertisements that are aired during the brief periods before federal elections or that are targeted to a particular audience.

BCRA's prohibition on the use of corporate and union treasury funds to finance "electioneering communications" applies to nonprofit as well as for-profit corporations. See *McConnell*, 540 U.S. at 209-210. That financing restriction is not subject to any express statutory exception for *MCFL* organizations. See *id.* at 211. "[T]o avoid constitutional concerns," however, the Court in *McConnell* construed the statutory ban on the use of corporate treasury funds for "electioneering communications" to be inapplicable to *MCFL* organizations. See *ibid.* Any corporation or union remains free, moreover, to establish a separate segregated fund and to pay for "electioneering communications" from that fund. 2 U.S.C. 441b(b)(2)(C) (Supp. II 2002).

3. In *McConnell*, this Court upheld against constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for "electioneering communications." See 540 U.S. at 203-209. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162, and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990)). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Ibid.* (quoting *Beaumont*, 539 U.S. at 163). The Court also

noted that its campaign-finance jurisprudence manifests "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted).

The Court in *McConnell* squarely rejected the plaintiffs' argument that Congress's authority to regulate the campaign-related speech of corporations and unions is limited, as a constitutional matter, to speech that contains "express advocacy" of particular electoral results. See 540 U.S. at 190-194. The Court explained that "the concept of express advocacy" was "not a first principle of constitutional law," but rather a matter of statutory construction "born of an effort to avoid constitutional infirmities" by placing a limiting construction on otherwise ambiguous statutory language. *Id.* at 192. The Court further observed that BCRA's "definition of 'electioneering communication' raises none of the vagueness concerns that drove [the Court's] analysis in *Buckley*" because the criteria used to define that term "are both easily understood and objectively determinable." *Id.* at 194.

The Court in *McConnell* also rejected the plaintiffs' contention that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." 540 U.S. at 206. Based on its examination of the record before the district court, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communication" were intended to influence electoral outcomes. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the

future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.* This Court also noted that, in light of its decision to "uphold all applications of the primary definition" of the term "electioneering communication," the Court "ha[d] no occasion to discuss the backup definition," *id.* at 190 n.73, which had been addressed and upheld in the district court decision under review, see *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 184-185 (D.D.C. 2003) (per curiam).

4. Appellant Wisconsin Right To Life, Inc., is a nonprofit, nonstock Wisconsin corporation. Appellant's amended complaint asserted that the corporation is tax-exempt under Section 501(c)(4) of the Internal Revenue Code, and that it was organized to protect "individual human life from the time of fertilization until natural death." Amended Compl. ¶¶ 20, 22; see J.S. App. 4a. Appellant asserted that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10—*i.e.*, the regulation that implements the *MCFL* exception. See J.S. App. 4a; p. 4, *supra*. Appellant administers its own separate segregated fund for campaign-related activity. See J.S. App. 5a. During the 1992 and 1998 election cycles, appellant's PAC made independent expenditures that, *inter alia*, opposed the candidacy of United States Senator Russell Feingold. See FEC Exhs. 8, 9.

Beginning in late 2003, candidates who opposed Senator Feingold's reelection efforts "made Senator Feingold's support of Senate filibusters against judicial

nominees a campaign issue." J.S. App. 5a. "In March 2004, [appellant's] PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." *Ibid.* During early 2004, appellant "used a variety of non-broadcast communications" to express opposition to the filibustering of judicial nominees, and on July 14, 2004, it issued a news release criticizing Senator Feingold's record on that issue. *Ibid.* On July 26, 2004, appellant began using its corporate treasury funds to finance the airing of three broadcast advertisements that criticized the filibusters and identified Senator Feingold by name. *Id.* at 5a, 6a, 13a-17a.

5. On July 28, 2004, appellant filed suit against the FEC in federal district court, alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communications" as defined in the Act is unconstitutional as applied to appellant's advertising disbursements. J.S. App. 6a. Appellant sought a preliminary injunction barring enforcement of the statute in these circumstances. *Ibid.* Appellant "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions * * * during the period between August 15, 2004 and November 2, 2004." *Id.* at 5a. Pursuant to BCRA § 403(a)(1), 116 Stat. 114, a three-judge district court was convened to entertain the action.

The three-judge district court unanimously denied appellant's request for a preliminary injunction. J.S. App. 4a-12a. In addressing appellant's likelihood of success on the merits, the district court explained that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds

before us." *Id.* at 7a. The district court observed that this Court in *McConnell* had expressly declined to address the "backup definition" of "electioneering communication" set forth in 2 U.S.C. 434(f)(3)(A)(ii) (Supp. II 2002) because the Court had upheld "*all applications of the primary definition.*" J.S. App. 7a (quoting *McConnell*, 540 U.S. at 190 n.73). The district court also noted that, in contrast to *McConnell*'s discussion of BCRA § 203, this Court had explicitly acknowledged that other challenged parts of BCRA might be subject to future as-applied challenges. *Id.* at 7a-8a.

The district court further explained that its "reading of *McConnell* that as-applied challenges to [2 U.S.C.] § 441b are foreclosed is but one reason [the court] f[ou]nd little likelihood of success on the merits." J.S. App. 8a. In addition, the court found that the specific facts of this case "suggest that [appellant's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Ibid.* The district court explained:

> In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of support or opposition" regarding candidates. Here, [appellant] and [appellant's] PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did [appellant] switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom [appellant] names in its broadcast advertisements, and

the PAC announcing as a priority "sending Feingold packing."

Id. at 8a-9a (citations omitted).

The district court subsequently dismissed appellant's complaint in an unpublished memorandum opinion and order. J.S. App. 1a-3a. The court held, "for the reasons set forth in [the preliminary-injunction] opinion," that appellant's as-applied challenge was "foreclosed by [this] Court's decision in *McConnell*." *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

A. Just two Terms ago in an extraordinary sitting, this Court considered and rejected a facial challenge to BCRA's restrictions on the corporate financing of "electioneering communications" as defined in the Act. *McConnell* v. *FEC*, 540 U.S. 93 (2003). The Court's decision in *McConnell* effectively forecloses appellant's as-applied constitutional challenge to those restrictions. The Court recognized that the term "electioneering communication," as defined in BCRA § 201(a), would encompass some advertisements that were not intended to influence federal elections. Indeed, much of the dispute among the parties concerning the restrictions centered on the degree of prophylaxis in BCRA's primary definition and on whether any prophylaxis was permissible under the First Amendment.

The Court in *McConnell* nevertheless sustained BCRA's bright-line approach and held that the challenged BCRA provisions were valid in *all* their applications, explaining that constitutionally sufficient alternatives remain available to advertisers who do not intend to affect voting behavior. The Court's analysis therefore precludes the type of as-applied challenges that otherwise might be brought following an unsuccessful facial

challenge to a statute. Principles of *stare decisis* strongly counsel in favor of strict adherence to the Court's decision in *McConnell*.

B. Acceptance of appellant's *own* as-applied constitutional challenge not only would be inconsistent with the Court's decision in *McConnell*, but would be especially disruptive of the statutory scheme upheld in that case. The statutory definition of "electioneering communication" is intended to provide a clear bright-line rule that correlates closely, though admittedly not precisely, with intent to influence federal elections. The bright-line nature of the rule—both its practical advantages and its alleged constitutional deficiencies—was a focal point of the constitutional challenge in *McConnell*.

In its as-applied challenge, by contrast, appellant has made no effort to articulate an objective and determinate standard for identifying those advertisers or advertisements as to which the BCRA financing restrictions are unconstitutional. Indeed, in its jurisdictional statement appellant proposed a 16-factor test. In contrast to the objective and clearly-defined constitutional exemption adopted by this Court in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), appellant's ad hoc approach would require the sort of formless and unpredictable inquiry into a corporate advertiser's subjective purpose that Congress and this Court have sought to avoid. In addition, it would invite fact-intensive litigation and would require federal courts to parse the content of political advertisements and assess the likely intent of political advertisers in preliminary-injunction or temporary-restraining-order hearings conducted on the eve of federal elections.

C. There is no merit to appellant's claim that "grass-roots lobbying"—by which appellant appears to mean

efforts to persuade members of the public to contact elected officials regarding particular policy issues—is constitutionally exempt from BCRA's restrictions on corporate financing of "electioneering communications." A particular advertisement may be intended to induce citizens both to contact their elected representatives and to vote in a particular manner. Indeed, as Congress found, a group that feels strongly enough about an issue to air an advertisement on it in the months before an election—particularly a group, such as appellant, that has publicly opposed a candidate mentioned in its advertisements, see pp. 11-12, *supra*—will invariably have a view as to which candidates may be more favorably disposed to the group's view of the issue. Congress's authority to superintend federal elections includes the power to regulate corporate financing of such dual-purpose communications. Even if the Court were to conclude that Congress lacks a substantial *independent* interest in regulating corporate issue advocacy or "grassroots lobbying" as such, the incidental impact on such communications of measures reasonably designed to safeguard the electoral process neither renders the challenged BCRA provisions unconstitutional nor opens them to attack on an ad hoc, as-applied basis.

D. In light of Congress's requirement that corporate "electioneering communications" be financed through a PAC, appellant has no constitutional right to pay for the advertisements at issue here from a "segregated bank account" instead. Although appellant has expressed some willingness to finance its "grassroots lobbying" with funds donated solely by individuals, a corporate PAC is subject to significant fundraising restrictions and disclosure obligations that would not apply under appellant's "segregated bank account" proposal. Con-

gress considered and rejected the financing alternative that appellant suggests, and the Court in *McConnell* sustained the application of the relevant BCRA provisions to nonprofit corporations, like appellant, that do not fall within the *MCFL* exemption. And because appellant's "segregated bank account" proposal turns both on the content of the relevant communications and on the perceived relative importance of various BCRA provisions, it is likely incapable of workable administration.

ARGUMENT

THE DISTRICT COURT CORRECTLY REJECTED APPELLANT'S AS-APPLIED CONSTITUTIONAL CHALLENGE TO BCRA'S RESTRICTIONS ON THE CORPORATE FINANCING OF "ELECTIONEERING COMMUNICATIONS"

Just two Terms ago, this Court rejected a facial constitutional challenge to BCRA § 203's ban on the use of corporate treasury funds to finance "electioneering communications." *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003). In doing so, the Court specifically held that BCRA § 201(a)'s primary definition of that term—which, the Court recognized, contained a degree of prophylaxis—is constitutional in "all applications." *Id.* at 190 n.73. Appellant now contends (Br. i) that BCRA § 203 is unconstitutional as applied to the advertisements aired by appellant in July 2004, and to "grassroots lobbying communications generally." As the district court correctly held, appellant's as-applied challenge is squarely foreclosed by *McConnell*, and principles of *stare decisis* counsel strongly against deviating from *McConnell* here. In any event, appellant offers no sound basis for doubting that its own communications were intended at least in part to influence electoral outcomes, nor does it articulate a workable standard for

identifying those "electioneering communications" as to which a constitutional exemption should apply. The judgment of the district court therefore should be affirmed.

A. Appellant's As-Applied Constitutional Challenge Is Foreclosed By This Court's Decision In *McConnell*

The Court need go no further than *McConnell* to dispose of this case. As the district court explained in denying appellant's request for preliminary injunctive relief, although *McConnell* involved a facial challenge, the "reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds" here. J.S. App. 7a. The record in *McConnell* contained numerous advertisements that fell within BCRA's definition of "electioneering communication," but that the plaintiffs characterized as "pure issue advertisements." *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 574 (D.D.C. 2003) (Kollar-Kotelly, J.); see *id.* at 574-579. This Court in *McConnell* was thus directly confronted with the contention that BCRA § 203 is unconstitutional because of its potential to burden communicative activity that qualifies as an "electioneering communication" under BCRA but is not intended to influence federal elections. Indeed, the fact that the statute could apply to such advertisements was the *focus* of the plaintiffs' constitutional challenge to BCRA § 203 in *McConnell*.

While acknowledging that BCRA § 201(a)'s primary definition of "electioneering communication" might encompass some such advertisements, the Court squarely held that the definition is constitutional in *all* its applications. In reaching that conclusion—which was necessary to the Court's rejection of the plaintiffs' challenge to BCRA § 203 and to its decision not to address the consti-

tutionality of the backup definition—the Court recognized that BCRA §§ 201(a) and 203 impose only a modest burden on speakers who wish to discuss issues of public concern but do not intend to influence federal elections, and that the establishment of an objective bright-line rule was essential to the achievement of Congress's objectives. As a result, although the rejection of a facial challenge to the constitutionality of a statute typically will have no impact on a plaintiff's ability to bring a subsequent as-applied challenge, in this case the prophylactic nature of the provision at issue, the pointed constitutional challenge to such prophylaxis, and the reasoning of the Court in *McConnell* in rejecting that challenge necessarily preclude subsequent as-applied attacks.

1. The parties in *McConnell* recognized that BCRA's primary definition of "electioneering communication" encompasses at least some advertisements that are not intended to influence federal elections, while disagreeing about the constitutional significance of that fact. The plaintiffs contended that such advertisements comprise a sufficiently large percentage of the total communications covered by BCRA § 203 as to render the provision unconstitutional on its face. See, *e.g.*, Br. for Senator Mitch McConnell, et al. at 49-57, *McConnell* v. *FEC*, *supra* (Nos. 02-1674, et al.). The statute's defenders, by contrast, argued that the plaintiffs' overbreadth challenge should be rejected because "BCRA's primary definition of 'electioneering communications' is narrowly tailored to advance several different compelling government interests," Br. for FEC, et al. at 105, *McConnell* v. *FEC*, *supra* (Nos. 02-1674, et al.), and because the "electioneering communication" provisions

impose only minimal burdens on the corporate and union advertisers to which those provisions apply, *id.* at 106.

This Court's categorical rejection of the plaintiffs' overbreadth challenge, unaccompanied by any suggestion that the acknowledged prophylactic scope of BCRA's "electioneering communication" provisions could furnish the basis for a subsequent as-applied constitutional attack, effectively forecloses appellant's current claim that its advertisements are immune from federal regulation because they purportedly fall outside the heartland of Congress's concern. That is particularly true given that Congress quite intentionally adopted a bright-line, prophylactic rule for identifying "electioneering communications" by establishing statutory criteria that indisputably cover the advertisements at issue in this case. This Court approved that bright-line approach over the objection of dissenting Justices that such prophylactic rules were incompatible with the First Amendment. See *McConnell*, 540 U.S. at 281-282 (Thomas, J., dissenting); *id.* at 334 (Kennedy, J., dissenting).[3]

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[3] The government's brief in *McConnell* argued that, "[t]o the extent that the definition [of 'electioneering communication'] is not *perfectly* tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis." Br. for FEC, et al. at 105-106, *McConnell* v. *FEC*, *supra* (Nos. 02-1674, et al.). The principal thrust of the government's defense of the "electioneering communication" provisions, however, was that BCRA's primary definition of that term is valid because of the importance of the government interests served by those provisions and the minimal nature of the burdens they impose. See generally *id.* at 103-112. The Court in *McConnell* agreed with the latter contention and did not identify future as-applied challenges as a possible means of addressing the acknowledged (and unavoidable) imprecision in the statutory definition. Accordingly, the statement in the government's brief

Indeed, far from suggesting that BCRA § 203's restrictions on the funding of "electioneering communications" would be subject to future as-applied First Amendment challenges, the Court in *McConnell* made clear that those restrictions are constitutional in "*all* applications." 540 U.S. at 190 n.73 (emphasis added). After noting that BCRA contains both a primary and a "backup" definition of the term "electioneering communication" (see p. 7-9, *supra*), the Court stated that, because it had upheld "all applications of the primary definition" against the plaintiffs' constitutional challenge, the Court had "no occasion to discuss the backup definition." 540 U.S. at 190 n.73. The Court's declination was particularly significant because the district court decision under review had rejected the primary definition and had addressed and upheld the backup definition. See *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 184-185 (D.D.C. 2003) (per curiam). In this Court, moreover, the principal dissent on Title II of BCRA disagreed with the Court's decision to uphold the primary definition and therefore addressed the constitutionality of the backup definition. See *McConnell*, 540 U.S. at 337-338 (Kennedy, J., dissenting).[4]

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provides no basis for limiting the scope of the Court's holding in *McConnell*.

[4] The fact that Congress included a more fact-dependent backup definition of "electioneering communication" indicates Congress's awareness that the prophylactic nature of its *primary* definition could subject BCRA §§ 201(a) and 203 to a constitutional overbreadth challenge. Inclusion of the backup definition further suggests a congressional expectation that the primary definition would be either sustained or invalidated *in toto*. In light of the *McConnell* Court's rejection of the plaintiffs' overbreadth challenge to the primary definition, and to BCRA's attendant restrictions on corporate financing of "electioneering communications," it would subvert both Congress's

Later in its opinion, the Court summarized its holding with respect to BCRA § 203. The Court specifically described its analysis of that provision as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey [a] message of support or opposition." *McConnell*, 540 U.S. at 239. Accordingly, the Court's decision in *McConnell* effectively forecloses the type of follow-on, as-applied constitutional attack on the statute attempted by appellant here.[5]

2. To be sure, in a typical case, a determination that a statute is facially valid will simply mean that the statute is capable of constitutional application and will not compel the conclusion that the law is constitutional in *all* its applications. Cf. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). A judicial decision rejecting a facial challenge to a statute therefore will not ordinarily foreclose subsequent as-applied attacks. In this case, however, appellant's as-applied constitutional challenge to BCRA § 203 is inconsistent both with the prophylactic nature of the BCRA provisions at issue and with this Court's rationale for rejecting the *McConnell* plaintiffs' facial challenge.[6]

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intent and this Court's decision to permit appellant's current as-applied challenge to go forward.

[5] Appellant suggests (Br. 15) that the Court in *McConnell* held BCRA's restrictions on corporate financing of electioneering communications to be unconstitutional as applied to *MCFL* organizations. That is incorrect. Rather, "to avoid constitutional concerns," the Court *interpreted* those restrictions to be inapplicable to *MCFL* organizations, and it sustained the validity of BCRA § 204 (116 Stat. 92) as so construed. See 540 U.S. at 211.

[6] In other contexts as well, the doctrinal test the Court employs in resolving a facial challenge may have the effect of foreclosing sub-

In arguing that this Court's opinion in *McConnell* should not be construed to foreclose as-applied challenges to BCRA § 203's restrictions on the financing of "electioneering communications," appellant observes (Br. 15) that "no court can foresee all possible future fact situations that might arise and require the considered constitutional analysis of the federal courts." This Court in *McConnell* recognized, however, that BCRA's definition of "electioneering communication" could encompass some advertisements that were not actually intended to influence electoral outcomes. As noted above, that fact was the subject of briefing by the parties and formed the basis for the plaintiffs' overbreadth challenge. See pp. 10-11, *supra*; see, *e.g.*, Br. for National Right to Life Committee, Inc., at 15-35 (No. 02-1733). In holding that the prospect of such applications did not render the statute unconstitutionally overbroad, the Court explained:

> The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief [*i.e.*, 30- and 60-day] preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. Nevertheless, the vast

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sequent as-applied attacks. For example, this Court's determination that a federal statute enacted pursuant to Section 5 of the Fourteenth Amendment is "congruent and proportional" to the constitutional violations sought to be remedied, see, *e.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727-728, 737-740 (2003), should be understood to foreclose a subsequent contention that the law is unconstitutional as applied to a particular defendant whose conduct falls within the statute's prophylactic scope—at least if the as-applied challenge is premised on the fact that the conduct falls within the prophylaxis.

> majority of ads clearly had such a purpose. *Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.*

540 U.S. at 206 (emphasis added; citations omitted).

The Court in *McConnell* thus recognized that at least some advertisements falling within BCRA § 201(a)'s definition of "electioneering communication" are not actually intended to influence federal elections. Far from suggesting that BCRA's financing restrictions would be subject to constitutional challenge as applied to such advertisements, however, the Court stated that corporations and unions could comply with the law by (1) "simply avoiding any specific reference to federal candidates" or (2) "paying for the ad from a segregated fund." 540 U.S. at 206. The Court's description of the legal alternatives open to future corporate advertisers whose communications might fall within BCRA § 201(a)'s carefully crafted definition of "electioneering communication" is wholly inconsistent with appellant's contention that, so long as an advertiser does not intend to influence federal elections, it is constitutionally entitled to use general treasury funds to finance advertisements encompassed by BCRA's definition of "electioneering communication." It is also wholly improbable that the Court in *McConnell* would have gone to such lengths to explain the alternatives available to corporations and unions and why BCRA § 201(a) is constitutional in "all applications" if it intended to leave the door open to as-applied constitutional challenges by any corporate or union advertiser willing to argue that it did not

intend an advertisement falling within the definition of "electioneering communication" to influence a federal election.[7]

In this regard, the *McConnell* Court's rejection of the constitutional attack on the prophylactic nature of BCRA's treatment of "electioneering communications," and the effect of that rejection on subsequent as-applied challenges, are no different from previous campaign-finance precedents. In upholding contribution limits, the Court has recognized that many who would contribute above the limit do so without any intent to distort the system, but the Court has nonetheless upheld such limits without opening the door to subsequent as-applied attacks by large-dollar donors with pure motives. See p. 30, *infra*. Likewise, in *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), when the Court rejected the contention that a corporate expenditure ban was overbroad because the ban encompassed closed corporations without great wealth, see *id.* at 661, the Court effectively foreclosed any subsequent claim that the statute was unconstitutional as applied to a closed corporation.

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[7] In contrast to its discussion of the definition of "electioneering communication," the Court explicitly referred to the availability of as-applied challenges in at least three distinct contexts in upholding portions of Title I of BCRA against facial attack, in at least one context in upholding part of BCRA Title V, and once regarding the disclosure requirements of Title II. See 540 U.S. at 157 n.52, 159, 173, 199, 244. Similarly in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court provided specific guidance as to what evidence would be required in later as-applied challenges by minor parties claiming exemption from the FECA's disclosure requirements, see *id.* at 70-71—guidance that the Court later followed in *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 92-102 (1982).

B. Acceptance Of Appellant's As-Applied Challenge To BCRA's "Electioneering Communications" Provisions Would Substantially Undermine Congress's Effort To Develop An Objective Bright-Line Rule For Identifying The Election-Related Advertisements That May Not Be Financed With Corporate And Union Treasury Funds

As explained above, this Court's analysis in *McConnell* forecloses as-applied constitutional challenges to BCRA's "electioneering communications" provisions, at least where, as here, the gravamen of the claim is that specific advertisements indisputably encompassed by the statutory definition and with some effect on a federal election nonetheless are not actually intended to influence federal elections. Accepting a single as-applied challenge of that type would significantly erode if not defeat the primary definition adopted by Congress by permitting any political advertiser to argue that an advertisement that meets the statutory criteria for an "electioneering communication" nonetheless cannot be regulated as such because it was not actually intended to influence a federal election.

Acceptance of appellant's *own* constitutional challenge, moreover, would be *especially* disruptive of the statutory scheme upheld in *McConnell*. Appellant has made no effort to identify, through objective and determinate criteria, a clearly-defined class of advertisers (cf. *FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238 (1986); pp. 31-33, *infra*) or advertisements as to which the BCRA restrictions are alleged to be unconstitutional. Rather, appellant appears to contemplate that the resolution of each as-applied challenge will turn on an amorphous, case-specific inquiry into the actual intent of a particular speaker. That approach would sub-

vert Congress's effort to devise clear and workable standards for distinguishing political speech for which corporate and union treasury funds may be used from electioneering advertisements that must be financed through a PAC, and it would invite fact-intensive litigation that would enmesh courts in political debates on the eve of federal elections.

1. This Court in *Buckley* introduced the "express advocacy" test in order to ensure that earlier FECA provisions—including a provision that limited disbursements "for the purpose of . . . influencing" a federal election—were not intolerably vague. See *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976); *McConnell*, 540 U.S. at 190-192. Based on subsequent experience under the campaign-finance laws, however, Congress concluded, and the evidentiary record in *McConnell* amply demonstrated, that the "express advocacy" test did not adequately identify electioneering activity during the crucial pre-election periods. See *id.* at 127 & n.18, 193 n.77; pp. 6-7, *supra*.

After extensive investigation and debate, see, *e.g.*, *McConnell*, 540 U.S. at 129-132, "Congress enacted BCRA to correct the flaws it found in the existing system," *id.* at 194. The criteria specified in BCRA § 201(a)'s definition of "electioneering communication" correlate closely, though not precisely, with intent to influence federal elections. See *id.* at 206 (Court finds that the "vast majority" of prior advertisements encompassed by the definition "clearly" had an "electioneering purpose"). Congress took particular care, moreover, to provide clear warning to regulated parties by crafting a legal standard that

> raises none of the vagueness concerns that drove [the Court's] analysis in *Buckley*. The term "elec-

> tioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable.

Id. at 194.

Congress thus sought to prevent the wholesale evasion of restrictions on corporate and union campaign spending during the pre-election period that had existed under the pre-BCRA legal regime, while providing clear notice to corporate and union speakers of the legal restrictions that govern their communications. The definition of "electioneering communication," moreover, determines not what corporations may say, but whether particular advertisements may be financed with general treasury funds or must instead be financed through a PAC. And, on that issue, clear notice is particularly important.

2. Appellant's approach would reintroduce the indeterminacy that Congress and this Court have specifically sought to dispel in this important context. See, *e.g.*, *Buckley*, 424 U.S. at 43 (intent-based standard for identifying electioneering activity "offers no security for free discussion," "blankets with uncertainty whatever may be said," and "compels the speaker to hedge and trim") (quoting *Thomas* v. *Collins*, 323 U.S. 516, 535 (1945)). In its jurisdictional statement, appellant identified no less than 16 separate factors that purportedly "indicate[d] that [its] broadcast ads are authentic grass-roots lobbying and not electioneering." J.S. 5; see J.S. 5-6. Appellant's brief on the merits neither disavows those factors nor articulates any determinate legal test for resolving appellant's as-applied constitutional challenge.

Instead, appellant points to (Br. 4 n.4 (italics omitted)) four "details" of the pertinent advertisements (pertaining to the "topic," "timing," "candidate reference," and "tone" of the advertisements) that purportedly reveal appellant's intent to engage in "authentic grassroots lobbying and not electioneering."[8]

Appellant does not make clear whether it views all of the factors it identifies as necessary to establish entitlement to a constitutional exemption, whether a smaller subset of those factors would suffice, or when resort to the additional factors identified in its jurisdictional statement would be appropriate. Nor does appellant identify any principled reason that another litigant would be precluded from relying on *additional* factors suggesting that a particular advertisement was not intended to influence federal elections or would not have that effect. If appellant's approach were adopted, the permissibility of corporate and union disbursements would turn on the same sort of unstructured inquiry that the Court in *Buckley* found constitutionally problematic, and that Congress in enacting BCRA carefully sought to avoid.[9]

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[8] In other contexts, this Court has recognized the drawbacks of the type of indeterminate inquiry proposed by appellant here, including the potential for such a multi-factor, fact-dependent test to precipitate excessive litigation. See, *e.g.*, *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) ("[T]he proposed four- or seven-factor test would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal.").

[9] Some of appellant's amici offer their own definitions of "grassroots lobbying" and suggest that the approach outlined in appellant's jurisdictional statement would provide insufficient protection for corporate and union political advertising. See Br. of Chamber of Commerce 19, 20 n.12 (arguing that "most of [appellant's proposed] factors

In addressing constitutional challenges to other FECA provisions, this Court has recognized the value of bright-line rules in preventing evasion of the statute's anti-corruption purposes and in furnishing clear guidance to regulated entities. In *Buckley*, for example, the Court "assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court held, however, that the difficulty of isolating suspect contributions and Congress's interest in guarding against the inherent appearance of abuse justified uniform application of the $1000 individual contribution limit. *Id.* at 29-30. The Court's analysis clearly foreclosed future as-applied challenges to the contribution limits brought by well-intentioned donors who might seek to prove that their own contributions, though in excess of the statutory caps, would be made without any intent to receive special influence in return.[10] Where, as

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simply are not necessary" and suggesting instead an exemption for advertisements that address an "active legislative issue" and refer to candidates "only in their capacity" as incumbents with "responsibility" for the issue); Br. of McConnell 9 ("[g]rass-roots lobbying * * * encompasses any communication devoted exclusively to urging support or opposition for pending legislative or executive matters"); Br. of AFL-CIO 19, 22 (asserting that the "presence or absence of most" of the "16 features" in appellant's jurisdictional statement "should not be prerequisites to status as a 'genuine issue ad,'" and proposing a standard under which a broadcast must, *inter alia*, have a "substantial legislative or other non-electoral purpose"); Br. of Alliance for Justice 27 (arguing that appellant's "test" is "too narrow" and insisting that "referencing a targeted candidate's *position* on the issue in question is often necessary to the effectiveness of lobbying communications").

[10] Cf. *Goland* v. *United States*, 903 F.2d 1247, 1258-1259 (9th Cir. 1990) (contributions are subject to FECA limits even if a contributor keeps his identity a secret by using straw donors, thereby allegedly precluding the opportunity to exert undue influence).

here, recognition of a particular class of as-applied challenges to a bright-line rule would undermine Congress's substantial interest in clarity and predictability, there is nothing anomalous or unprecedented about foreclosing such challenges.[11]

3. The Court's decision in *MCFL*, *supra*, which exempted certain organizations from the FECA ban on corporate electioneering (see p. 4, *supra*), furnishes an

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[11] In upholding other restrictions on communicative activity against First Amendment challenges, the Court has similarly stressed the value of clear bright-line rules. In *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995), for example, the Court upheld Florida Bar rules prohibiting lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. *Id.* at 620. The Court did not question the claims of those challenging the rules that the injuries or grief of some victims are "relatively minor," but stressed instead that making case-specific judgments would entail "drawing difficult lines" as to the severity of different kinds of "grief, anger, or emotion." *Id.* at 633. The Court concluded that the Florida Bar's bright-line, 30-day rule was "reasonably well tailored to its stated objective of eliminating targeted mailings" that had caused many Floridians "to lose respect for the legal profession." *Ibid.* In *Hill* v. *Colorado*, 530 U.S. 703 (2000), the Court upheld a state law (see *id.* at 707) that prohibited demonstrators from coming closer than eight feet to unconsenting persons entering health-care facilities. The Court acknowledged that the law would "sometimes inhibit a demonstrator whose approach in fact would have proved harmless." *Id.* at 729. In light of the "great difficulty" of determining on an individualized basis whether particular approaches were "harassing," however, the Court concluded that "[a] bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself." *Ibid.*; see *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) ("any such exemption [from a rule limiting certain solicitation activities to specified physical locations] cannot be meaningfully limited to [the plaintiff], and as applied to similarly situated groups would prevent the State from furthering its important concern").

instructive contrast. The Court in *MCFL* explained that the rationale for prohibiting corporate independent expenditures in support of federal candidates "does not extend uniformly to all corporations," and that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." *Id.* at 263. The Court concluded that

> MCFL has three features essential to [the Court's] holding that it may not constitutionally be bound by § 441b's restriction on independent spending. *First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. * * * *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. * * * *Third*, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

Id. at 263-264.

The Court in *MCFL* thus identified a discrete and clearly-defined *class* of corporations as to which the justifications for FECA's restrictions on corporate electioneering were found not to apply. See *McConnell*, 540 U.S. at 210 (This Court's "decision in *MCFL* related to a carefully defined category of entities."). The exemption recognized in *MCFL* turns on an objective and readily administrable assessment of the organization's structure and overall activities, and can be understood as a means of identifying a subset of corporations for which a separate segregated fund for campaign-related expenditures would entail unnecessary burdens. Nei-

ther *MCFL* nor any subsequent decision of this Court, however, suggests that a corporation lacking the "three features essential to" the holding in that case (479 U.S. at 263) is entitled to bring an as-applied challenge seeking an individualized judicial determination whether, in light of the corporation's unique combination of attributes, its use of general treasury funds to finance campaign-related speech would actually create the dangers that the FECA/BCRA restrictions are intended to prevent.[12]

In two distinct respects, appellant's proposed mode of as-applied constitutional analysis would thus create difficulties of administration far greater than those entailed by the existing constitutional exemption for *MCFL* organizations. First, because appellant's as-applied challenge rests on the content of specific advertisements, rather than on the organization's structure and activities taken as a whole, acceptance of appellant's

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[12] Before this Court's decision in *McConnell*, some courts of appeals had concluded that even a nonprofit corporation that did not satisfy the *MCFL* criteria could seek a constitutional exemption from the FECA financing restrictions by arguing that, because it purportedly received only minimal donations from business corporations, its election-related disbursements of general treasury funds would not entail the dangers generally associated with corporate electoral advocacy. See *FEC* v. *NRA*, 254 F.3d 173, 191-193 (D.C. Cir. 2001); *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999), cert. denied, 528 U.S. 1153 (2000); *FEC* v. *Survival Educ. Fund, Inc.*, 65 F.3d 285, 292 (2d Cir. 1995); *Day* v. *Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994), cert. denied, 513 U.S. 1127 (1995). That understanding of *MCFL*, however, appears to have been effectively repudiated in *McConnell*. The Court in *McConnell* confirmed that its "decision in *MCFL* related to a carefully defined category of entities," 540 U.S. at 210, and it held without qualification that nonprofit corporations other than *MCFL* organizations could constitutionally be barred from using general treasury funds to finance "electioneering communications," see *id.* at 209-211.

approach would focus on the particular speech at issue, rather than on the entity in general, and thus every advertisement would provide a new opportunity for litigation. Indeed, even the *same* advertisements might provide the basis for new litigation in the case of a different speaker who alleged that *he* did not intend for the advertisements to influence an election.

Second, because appellant has made no effort to articulate an objective and determinate standard for identifying those corporate broadcast advertisements to which the BCRA financing restrictions cannot constitutionally be applied, the resolution of each such challenge would involve a complex and fact-bound inquiry rather than the application of a clear categorical rule. Acceptance of appellant's proposed constitutional methodology would thus multiply litigation over federal campaign-finance regulation, substantially complicate the administration of federal restrictions on corporate and union electioneering by blurring the bright lines drawn by Congress, and markedly subvert Congress's effort to avoid "the vagueness concerns that drove [this Court's] analysis in *Buckley*." *McConnell*, 540 U.S. at 194.

Moreover, all of this factbound litigation would occur in the context of preliminary-injunction or temporary-restraining-order hearings on the eve of elections and would enmesh the federal courts in political debate, since BCRA § 201(a)'s definition of "electioneering communication" is limited to advertisements that, *inter alia*, are aired in the 30- or 60-day window before a federal election and identify a federal candidate by name. The fact that as-applied challenges would likely arise shortly before federal elections would also require the courts to attempt to process the suits on an expedited basis, multiplying the complexity and costs of the litigation for all

involved. And under BCRA § 403(a) and (d), 116 Stat. 113-114, the plaintiff in any such suit would be entitled to have the action heard by a three-judge district court, with a right of appeal directly to this Court.

At a minimum, even if *some* type of as-applied constitutional challenge to BCRA's primary definition can be successfully brought in the wake of *McConnell*, the Court should require the plaintiff in such a suit to point to an objective, readily discernible basis for identifying an allegedly unconstitutional application. Appellant has demonstrably failed to identify such a basis for invalidating BCRA § 203 as applied to the advertisements at issue here.

C. Even If Appellant Could Demonstrate That The Advertisements At Issue Here Were "Grassroots Lobbying" Advertisements, Appellant Would Not Be Entitled To A Constitutional Exemption From BCRA's Ban On The Use Of Corporate Treasury Funds To Finance "Electioneering Communications"

The thrust of appellant's argument in this case is that Congress lacks constitutional authority to forbid the use of corporate treasury funds to broadcast "grassroots lobbying" advertisements. Although appellant does not unequivocally endorse any particular definition of the term "grassroots lobbying," appellant appears (see, *e.g.*, Br. 21) to use the term to refer to efforts to influence government policy indirectly by urging *other* members of the public to contact their elected represen-

tatives regarding particular policy issues.[13] Appellant's constitutional claim is misconceived.

1. Appellant's contention (Br. 4 n.4) that the advertisements at issue here "were authentic grassroots lobbying and not electioneering" assumes a clean divide between lobbying and electioneering communications that simply does not exist in the real world. In the first place, it is not clear that appellant's effort to distinguish "grassroots lobbying" from electioneering is materially different from the distinction between issue advocacy and political advocacy rejected by Congress in BCRA and by this Court (both the majority and the dissenters) in *McConnell*. See, *e.g.*, *McConnell*, 540 U.S. at 126 n.16 ("What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.") (quoting district court opinions, in turn quoting National Rifle Association official); *id.* at 327 (Kennedy, J., dissenting).

In the district court proceedings in *McConnell*, Judge Leon cast the deciding vote with respect to BCRA § 201(a), voting to strike down the primary definition of "electioneering communication," see *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 792-799 (D.D.C. 2003), but to uphold the backup definition, see *id.* at 799-803; see also *id.* at 187 (summary of the district court's holdings in *McConnell* with respect to the various challenged BCRA provisions). Judge Leon concluded that the primary

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[13] Although petitioner invokes "the inherent right of the people to participate in self-government and the express First Amendment right to petition" (Br. 17), BCRA does not restrict the efforts of corporations or others to contact elected officials directly. The term "electioneering communication" is limited to broadcast, cable, or satellite communications that, *inter alia*, "can be received by 50,000 or more persons" within the State or district that the candidate identified in the communication seeks to represent. 2 U.S.C. 434(f)(3)(C) (Supp. II 2002).

definition was invalid because of its potential impact on "genuine issue advertisements in the periods immediately preceding general and primary elections, the sole purpose of which is educating the viewers about an upcoming vote on pending legislation, and encouraging them to inform their elected representative to vote for or against the bill." *Id.* at 793. In this Court, various plaintiffs similarly contended that BCRA's "electioneering communications" provisions are unconstitutional because the primary definition of that term would encompass advertisements urging citizens to contact their elected representatives regarding pending legislative issues. See, *e.g.*, Br. of AFL-CIO at 19 (No. 02-1755) (definition encompasses communications that "[c]all upon a Member of Congress to support or oppose imminent legislation, or ask viewers or listeners to urge the Member to do so"); Br. of Senator Mitchell et al. at 50-52 (No. 02-1674 et al.). Appellant's current contention that the challenged BCRA financing restrictions are unconstitutional as applied to "grassroots lobbying" therefore adds nothing of substance to what was before the Court in *McConnell*.

In any event, appellant's proposed lobbying/electioneering distinction dissolves in practical application. As abundant evidence before Congress and the *McConnell* Court made clear, advertisements exhorting interested citizens to contact their elected representatives may *also* have the purpose of influencing those citizens' votes. As Congress recognized, common sense suggests that an individual or organization that funds advertisements exhorting citizens to contact their elected representatives on an issue will generally prefer that voters cast their ballots for candidates who favor the advertiser's view. And in any event, a broadcast

advertisement that is aired shortly before a federal election, refers to a clearly identified federal candidate, and is targeted to the relevant electorate is likely to have a significant *effect* on voting behavior. Congress may act to prevent the use of corporate and union treasury funds for communications having such electoral impacts, regardless of the subjective intent of the advertiser.

On the eve of a federal election, the most effective strategy for precipitating a change in government policy on a particular issue may well be to work to alter the composition of Congress rather than to lobby existing legislators to change their minds. When the objective characteristics of a particular communication indicate that it is intended at least in significant part to influence federal elections and is likely to have that effect, even clear proof of an *additional* "lobbying" purpose would not negate Congress's power to forbid the use of corporate and union treasury funds to finance that communication.[14]

2. In discussing the sorts of pre-BCRA advertisements that were intended to influence federal elections but avoided words of express advocacy, the Court in *McConnell* observed that "[l]ittle difference existed * * * between an ad that urged viewers to

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[14] As appellant explains (Br. 10-11, 24 n.19), some of BCRA's sponsors proposed, but the FEC ultimately declined to adopt, a regulatory exemption for certain communications urging members of the public to contact their elected representatives. The fact that the sponsors urged adoption of such an exemption, however, does not mean that it is constitutionally required, much less that the sponsors intended to open BCRA to as-applied challenges of the type at issue here. In any event, because the proposed regulatory exemption would have specifically excluded any communication that identified a federal candidate by name (see Appellant's Br. 24-25 n.19), it would not have encompassed the advertisements involved in this case.

'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court thus treated an appeal to citizens to contact an identified elected representative, when targeted to the relevant electorate and issued during the 30- and 60-day periods preceding federal primary and general elections, as a *paradigmatic* example of the advertisements that BCRA's "electioneering communication" provisions were intended to address. The record before the district court in *McConnell* likewise reflected the understanding of current and former Members of Congress that such advertisements were routinely used to influence electoral outcomes. See, *e.g.*, *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 532-533 (D.D.C. 2003) (Kollar-Kotelly, J.).

Appellant takes pains to argue (see, *e.g.*, Br. 4 n.4, 29) that its own lobbying message was not a "sham"—*i.e.*, that appellant's opposition to the filibustering of judicial nominees is sincere. That is beside the point. A constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation. In any event, appellant's representations as to the sincerity of its views, even if taken as true, do not demonstrate the absence of a significant intent to prevent the re-election of a Senator who had engaged in the legislative conduct that appellant sincerely opposed.

Insofar as its advocacy program as a whole was concerned, appellant evidently regarded exhortations to citizens to lobby Senator Feingold as complementing the organization's effort to unseat him at the polls, since appellant aired the advertisements at issue in this case

after its own PAC had "endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." J.S. App. 5a. Just as appellant's overall advocacy program was designed to accomplish dual objectives, individual advertisements could be intended *both* to encourage citizens to contact Senator Feingold directly *and* to induce voters to cast their ballots for his opponent. Thus, when the objective characteristics of particular broadcast advertisements (*i.e.*, their reference to a clearly-identified candidate, targeting to the relevant electorate, and airing during a 30- or 60-day pre-election period) indicate an intent to influence a federal election, even strong evidence of a sincere lobbying purpose would not rebut that inference. And even if appellant could somehow demonstrate that its *sole* subjective motivation for airing a particular advertisement was to induce citizens to lobby their representatives, the prospect that the advertisement will nevertheless have a significant electoral *effect* is an appropriate subject of congressional concern. See p. 37-38, *supra*.

3. Appellant offers no basis for questioning Congress's authority to bar the use of corporate and union treasury funds to finance advertisements that are intended or that have the effect both of influencing electoral outcomes and of inducing citizens to lobby their elected representatives. Most electoral advertisements discuss issues of public importance, and "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. This Court's decisions applying

the "express advocacy" standard, for example, do not suggest that corporate disbursements for communications that explicitly urge the election or defeat of candidates can be immunized from federal regulation through the inclusion of an additional lobbying message.[15]

4. Lobbying has no higher First Amendment status than electoral advocacy. The FECA/BCRA restrictions on the use of corporate funds to influence federal elections are not premised on any notion that "[a]dvocacy of the election or defeat of candidates * * * is * * * less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *McConnell*, 540 U.S. at 205 (quoting *Buckley*, 424 U.S. at 48). Rather, those provisions reflect Congress's determination that corporate "electioneering," as defined by statute, poses distinct dangers to the integrity of the electoral process that other forms of corporate advocacy do not present. See, *e.g.*, *ibid.*; *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 790 (1978). Application of BCRA's financing restrictions

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[15] *MCFL* involved a newsletter whose most explicit exhortation was to "VOTE PRO-LIFE." 479 U.S. at 243. That message underscores the inherent connection between issues and candidate elections where many voters view candidates as means to an end (viz., the implementation of preferred government policies on issues the voter cares about). Nonetheless, because that issue-based message was tied directly to particular candidates and their positions on the issue of abortion, the Court found that the newsletter went "beyond issue discussion to express electoral advocacy" that "falls squarely within § 441b," *id.* at 249-250. The Court thus confirmed that the presence of "issue discussion" does not immunize an election-influencing communication from regulation. Cf. *McConnell*, 540 U.S. at 123, 166 (FECA definition of "contribution" properly includes activities that simultaneously influence both federal and state elections because the influence on federal elections is an appropriate subject of congressional concern).

to corporate advertisements that have both electoral and non-electoral purposes is a necessary and appropriate means of addressing those dangers. And because communications urging citizens to contact their representatives on matters of public concern have no higher constitutional status than does pure electioneering, the "compelling" governmental interests that support regulation of corporate electoral advocacy (see *McConnell*, 540 U.S. at 205) are sufficient to justify BCRA's incidental impact on "grassroots lobbying."[16]

5. Appellant contends (Br. 20-29) that the district court's rejection of its as-applied challenge to BCRA § 203 is inconsistent with this Court's recognition, in *McConnell* and prior decisions, of a constitutional distinction between regulation of "lobbying" and regulation of "electioneering." That argument reflects a misunder-

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[16] Although the three advertisements that were the subject of appellant's original complaint can now be broadcast in Wisconsin without regard to BCRA § 203 until the next Senate election is imminent, appellant has provided no evidence that it has run such advertisements after last November's elections or that it has specific plans to do so, even though the issue discussed in the advertisements (Senate filibusters of judicial nominees) was a focus of particularly intense public interest during the spring of 2005 and remains a topic of widespread public concern. Before this Court, appellant states only that it "intends to do similar grass-roots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period." J.S. 7; see Br. 9 n.8. That election-centered pattern of advertising is similar to the pattern that preceded and prompted Congress's passage of BCRA, see *McConnell*, 540 U.S. at 127 ("[T]he conclusion that [purported issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."), and it reinforces the inference that appellant's advertisements were in the heartland of Congress's concern.

standing of the rationale for Congress's adoption of an objective bright-line rule.

The Court in *McConnell* reaffirmed the proposition, previously established in such cases as *Bellotti*, that "unusually important interests underlie the regulation of corporations' campaign-related speech." 540 U.S. at 206 n.88. Appellant is therefore correct that any federal interest in regulating corporate issue advocacy *as such* is of considerably less magnitude than is the interest in regulating corporate *campaign* spending in candidate elections. But neither Congress's adoption of a bright-line rule, nor the district court's rejection of appellant's as-applied constitutional challenge, reflects the view that regulation of corporate issue advocacy or "grass-roots lobbying" is subject to reduced constitutional scrutiny or is desirable for its own sake. Rather, any restrictions that BCRA imposes on the financing of advertisements that in fact have no electioneering purpose are simply the incidental byproduct of Congress's need to employ a bright-line rule to prevent corporate treasury funds from being used to influence federal elections. Strict scrutiny under the First Amendment requires narrow tailoring, not perfect tailoring. And, especially in light of the alternative avenues for corporations and unions to finance "electioneering communications," once this Court has upheld a bright-line rule as narrowly tailored, as it did in *McConnell*, that should resolve the matter.

Recognizing the strength of the federal interest in preventing actual or apparent electoral corruption, the need for clarity as to the range of communications subject to the financing restrictions, the futility of prior efforts to identify all relevant election-related communications through the "express advocacy" test, and the

minor burden that BCRA § 203 places upon corporate and union speakers that wish to engage in issue advocacy but do not seek to influence electoral outcomes, the Court in *McConnell* sustained that provision against constitutional attack. Thus, even if the Court were to conclude that Congress lacks a substantial *independent* interest in regulating corporate issue advocacy, the marginal impact of BCRA § 203 on such communications would not render the provision unconstitutional, either on its face or as applied.

D. Appellant's Offer To Finance The Advertisements At Issue Here From A Segregated Bank Account Does Not Alter The Constitutional Analysis

Appellant asserts (Br. 28-29) that it does "not challenge the disclaimer and disclosure requirements" for "electioneering communications." As an alternative to its request for a complete constitutional exemption from BCRA's restrictions on the financing of corporate "electioneering communications," appellant states (Br. 4 n.4, 30-32; see Amended Compl. ¶¶ 64-69) that it is "willing" if necessary to finance "electioneering communications" from a "segregated bank account" containing only funds raised from individuals. After careful deliberation, however, Congress chose to require corporations to finance "electioneering communications" through a PAC, and it specifically rejected the segregated-bank-account alternative that appellant proposes. Because the Court in *McConnell* sustained the PAC requirement as applied to nonprofit corporations, appellant has no constitutional right to utilize a "segregated bank account" instead.

1. As the Court explained in *McConnell*, the "Snowe-Jeffords" provisions of BCRA § 203 appear on their face to exempt corporations encompassed by 26

U.S.C. 501(c)(4) or 527 from BCRA's requirement that corporate "electioneering communications" be financed through a PAC. In place of the restrictions imposed by BCRA on corporate "electioneering communications" generally, the Snowe-Jeffords provisions would have substituted the requirement that Section 501(c)(4) and 527 corporations pay for such communications with funds collected solely from individuals. See *McConnell*, 540 U.S. at 209 n.90. Because a corporate PAC is subject to significant fundraising restrictions and disclosure obligations that would not have applied to Section 501(c)(4) and 527 corporations under the Snowe-Jeffords provisions, those provisions would have increased the range of financing options available to any such nonprofit corporations that wished to make "electioneering communications."[17]

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[17] Unlike appellant's PAC, the "segregated bank account" that appellant offers to utilize for "electioneering communications" could solicit funds from individuals who are not its members, see 2 U.S.C. 441b(b)(4), and it could accept contributions in amounts exceeding the $5000 annual contribution limit of 2 U.S.C. 441a(a)(1)(C). In addition, appellant's assurances that it will disclose its receipts and disbursements for the advertisements "at the level at which Congress asserted a disclosure interest" (Amended Compl. ¶ 66), and that "any donors contributing in excess of $1,000 to the [segregated] account would be disclosed to the public" (Br. 32 (quoting Amended Compl. ¶ 67)), are insufficient to achieve compliance with the disclosure requirements that the FECA/BCRA regime imposes on political committees. Under BCRA, an advertiser that is *not* a political committee must disclose "electioneering communications" for which it spends $10,000 or more, and it must disclose the identity of donors who contribute $1000 or more. See 2 U.S.C. 434(f)(1), 434(f)(2)(E) and (F). Political committees like appellant's PAC, however, are required to disclose all receipts and disbursements of $200 or more. See 2 U.S.C. 434(b)(3) and (6).

BCRA § 204, however, known as the "Wellstone Amendment," states that the Snowe-Jeffords provisions are inapplicable to "targeted communications," a term defined to include "electioneering communications." See *McConnell*, 540 U.S. at 209-210 n.90. The practical effect of the Wellstone Amendment is to render the Snowe-Jeffords provisions a nullity. See *id.* at 210 n.90. After considering the interplay between the Snowe-Jeffords provisions and the Wellstone Amendment, see *id.* at 209-210 n.90, the Court in *McConnell* held that BCRA § 204's ban on the use of a nonprofit corporation's treasury funds to finance "electioneering communications" is "plainly valid" so long as that provision is construed to exempt *MCFL* organizations. *Id.* at 211; see *id.* at 210-211.

The Wellstone Amendment thus reflects an explicit and considered congressional determination, sustained by this Court in *McConnell*, that appellant's proposed "segregated bank account" alternative affords insufficient protection against corporate electoral abuse. Appellant has chosen to reap the advantages that the corporate form entails (see, *e.g.*, *FEC* v. *Beaumont*, 539 U.S. 146, 153-154, 159-160 (2003)), and it has elected to accept money from business corporations and/or to engage in other activities that bring it outside the "carefully defined category of entities" (*McConnell*, 540 U.S. at 210) that are eligible for the *MCFL* exemption. See pp. 4, 31-33, *supra*. Under this Court's precedents, appellant therefore may validly be required to finance its "electioneering communications" through a PAC rather than through the "segregated bank account" that it would prefer to utilize.

2. By allowing appellant to finance "electioneering communications" with money raised outside the restric-

tions applicable to political committees, appellant's "segregated bank account" proposal would increase the funds available to appellant for indisputably regulable activities such as direct contributions to federal candidates and express advocacy of electoral results. Compare *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 198-199 n.19 (1981) (plurality opinion) (donations "earmarked for administrative support" can be regulated as "contributions" because they free up other money to be used for more direct electoral activity). Indeed, appellant acknowledges that it objects to the requirement that the advertisements at issue here be financed through its PAC because it wishes to reserve its PAC funds for "contributions and independent expenditures." Br. 6; see 2 U.S.C. 431(17) (Supp. II 2002) defining "independent expenditure" to mean "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate"). Appellant's proposal, however, ignores the carefully balanced set of benefits and burdens that the Act applies to political committees. See *McConnell*, 540 U.S. at 152 n.48 (limits on contributions to political committees restrict "not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures").

3. Appellant acknowledges (Br. 32) that the "segregated bank account" it proposes would not be subject to all the restrictions applicable to PACs. Appellant nevertheless contends (*ibid.*) that this disparity does not matter "in the context of grass-roots lobbying because there is no potential for corruption." In other words, appel-

lant appears to contend that, even if corporate "grassroots lobbying" is not wholly immune from federal regulation, use of a "segregated bank account" is adequate to achieve BCRA's anti-corruption objectives. Appellant apparently envisions a mode of as-applied constitutional analysis in which the reviewing court will consider the content of specific corporate communications, together with the corporation's stated willingness to comply with some but not all requirements of the applicable legal regime, in order to determine whether the relevant corporate activity will actually create the dangers that BCRA is intended to prevent.

Appellant's "segregated bank account" argument represents a narrower attack on the statutory regime than does its primary theory that corporate "grassroots lobbying" is constitutionally exempt from federal regulation. As a practical matter, however, the constitutional methodology that appellant's fallback argument would entail is even less workable than a mode of review that turns on the content of the relevant advertisements standing alone. In addition to the practical difficulties created by appellant's failure to articulate a clear, objective standard for distinguishing "grassroots lobbying" from corporate electioneering (see pp. 26-35, *supra*), appellant's fallback argument would require a reviewing court to assess the relative importance to the FECA/BCRA regime of the statutory provisions that a particular corporate advertiser does and does not express a willingness to obey. It would essentially allow any corporation or union to litigate the validity of a nearly infinite range of hypothetical campaign-finance and disclosure regimes that Congress could have, but has not, enacted. Such an approach is almost certain to prove incapable of workable administration, and it would

dismantle the careful legislative balancing of interests that culminated in BCRA.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* AARP, COMMON CAUSE, INC., THE GREENLINING INSTITUTE, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, AND UNITED STATES PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization comprised of more than 35 million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans through advocacy, information, and services. AARP is nonpartisan and does not support or oppose any candidate for public office. Nor does it contribute money to political candidates' campaigns or to political parties. Older Americans have made clear their interest in promoting and protecting the integrity of our nation's electoral process. Because of the significance of campaign finance reform to its members, AARP was active in supporting enactment of the Bipartisan Campaign Reform Act (BCRA), and filed a brief as *amicus curiae* in this Court in *McConnell v. Federal Election Commission*. The issues in this case involving electioneering communications provisions of BCRA directly affect the interest of AARP in protecting the integrity of our election processes.

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 300,000 members and supporters nationwide. Common Cause has had a long-standing concern with the growing problem of soft money in the federal political process, and has publicly advocated for congressional action to ban soft money in order to restore integrity to the electoral system. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002 and filed an

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[1] *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of both parties, as indicated by letters of consent filed with the Court.

amicus brief in this Court in *McConnell v. Federal Election Commission*.

The Greenlining Institute is a non-partisan, non-profit organization that works to improve the quality of life for low-income and minority communities throughout the United States. The institute was founded in 1993 and emerged from the Greenlining Coalition, considered the oldest coalition of African American, Asian American/ Pacific Islander, and Latino community leaders organized around a common purpose. The Greenlining Institute's major mission is to create an antidote to redlining practices which have had adverse consequences in the ability of low-income and minority communities to obtain financial services and products.

The League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy. The League is organized in more than 850 communities in every state and has more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

The National Association of State PIRGs ("U.S. PIRG") represents state Public Interest Research Groups ("PIRGs") at the federal level, including in the federal courts. In addition, U.S. PIRG and other state PIRGs have an interest in campaign finance issues, and the resolution of this case will assist U.S. PIRG and other state PIRGs in its advocacy for effective and comprehensive campaign finance reforms.

SUMMARY OF ARGUMENT

Partly in response to mounting sham issue advocacy in federal elections, all of which evaded reasonable restrictions on corporate and labor election spending as well as long-standing disclosure requirements, Congress passed and the President signed the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). One of its central provisions, Title II, barred corporations and unions from funding so-called "electioneering communications" and required disclosure of "electioneering communications" funded from other sources. In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court upheld those provisions except insofar as they applied to certain "ideological nonprofits" meeting the strict conditions this Court had outlined earlier in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986).

Wisconsin Right to Life, Inc. ("WRTL") now seeks to relitigate this recent holding. Although it couches its challenge to these same provisions as limited to their application to vaguely defined "grassroots lobbying," WRTL is making the same arguments that this Court rejected in *McConnell* and supporting those arguments with ads that are virtually identical to the ones this Court considered there. This Court has seen, carefully considered, and recently rejected all of WRTL's arguments.

Furthermore, like the sham issue ads considered in *McConnell*, these "grassroots lobbying" ads aim to promote particular candidates in federal elections and likely have that effect. They are, in short, the "functional equivalent of express advocacy," which this Court found Congress could regulate in *McConnell*. 540 U.S. at 206. Although WRTL claims that these ads intend only to encourage voters to lobby their representatives on legislation, none of these ads actually mentions specific legislation or directly gives voters the rudimentary information they would need to

place a phone call or write a letter or email to their representatives.

WRTL and some amici supporting it also argue that BCRA's electioneering communications provisions place particular burdens on so-called § 501(c)(3) organizations, which receive generous tax subsidies under the Internal Revenue Code ("IRC"). Their arguments, however, get the law exactly backwards. However laudable its aims and ambitions, no organization has a right to public monies obtained through a tax subsidy or otherwise to spend on its own political speech. Congress, of course, must give it other ways to make such speech without public subsidy and Congress has done so here.

ARGUMENT

A. In Pressing for a "Grassroots Lobbying" Exception to BCRA's Electioneering Communications Provisions, WRTL Is Attempting to Relitigate *McConnell*.

In *McConnell*, plaintiffs argued, just as WRTL does here, that BCRA's electioneering communications provisions were unconstitutional because they covered ads meant to have legislative rather than electoral effects. The only difference was that in *McConnell* plaintiffs claimed that such reach invalidated the electioneering communications provisions in their entirety whereas now WRTL claims that it invalidates them only insofar as they touch grassroots lobbying. This is a distinction, however, without a difference.

1. The Arguments Are Identical.

In their briefs and at oral argument the *McConnell* plaintiffs – including the National Right to Life Committee (NRLC), represented by WRTL's counsel in this case – pressed hard one main argument: that Title II, if upheld,

would unconstitutionally impinge on efforts to influence legislation, particularly grassroots lobbying. The NRLC reply brief in *McConnell*, for instance, put squarely before this Court the same issues WRTL now raises here – the alleged unconstitutional impact of Title II on grassroots lobbying. Indeed, NRLC there said that Title II will "eliminate a whole *category* of American political speech by citizen groups for nearly a fourth of the year":

> That whole category of speech is *grass roots lobbying*, in which Citizens Associated for Amplified Free Expression, Inc. – during the bustling days of legislative activity just before the fall election as representatives try to ram through bills to buy votes before taking a recess to run home for final campaigning before the polls open – buys broadcast ads in the district of the legislator with an important vote needed to pass legislation protecting the nation from ruin by encouraging citizens to "Call Representative Swing-Vote and ask her to vote for the bill sponsored by Representatives Commonweal and Controversy."
>
> Defendants [sic] assertions that (1) genuine issue advocacy can readily be accomplished in a manner that does not trigger Title II of BCRA, and (2) that it is not necessary to refer to specific candidates for federal office in order to create effective [issue] ads, simply does not apply to grass roots lobbying. And citizen groups need to remain free to engage in grass roots lobbying through the media that Defendants concede is the most effective, during the time when legislation is being considered, which often can and often does fall during the days just before an election – the timing of which is wholly beyond the control of citizen groups and wholly in the hands of incumbent politicians.

> Grass roots lobbying is a fundamental part of our system of representative government that must remain available whenever it is needed. It is not a few marginal applications. And it is profoundly, negatively affected by Title II of BCRA.

Reply Br. of Appellants/Cross-Appellees National Right to Life Committee, *et al.* at 6-7, 540 U.S. 93 (2003) (No. 02-1733) (emphasis in original) (internal citations and some internal quotation marks omitted).

The National Rifle Association argued much the same in its brief challenging Title II:

> Title II's restriction on electioneering communications also fails the narrow tailoring standard because it unfairly criminalizes *numerous categories of speech* that are not intended to, and will not have the effect of, influencing federal elections. The NRA's extensive independent expenditures on television and radio broadcasting are designed to serve three principal purposes: (1) to educate the public about Second Amendment and related firearm issues, including pending legislative initiatives. . . .
>
> Broadcasts that urge viewers and listeners to oppose or support pending legislation do not implicate the concerns that allegedly animate Title II. Just as this Court has recognized that speech pertaining to referenda does not raise a substantial concern about corruption, so too speech urging the passage or defeat of pending legislation does not carry any threat of corrupting the political process.

Br. for Appellants the National Rifle Association, *et al.* at 35-36, 540 U.S. 93 (2003) (No. 02-1675) (emphasis in original).

The AFL-CIO similarly complained that Title II "poses an immediate, direct and substantial threat to the AFL-CIO's historic role in advocating for progressive social legislation, influencing other government actions affecting workers and their families, and educating union members and the general public about these issues." Br. for AFL-CIO Appellants/Cross Appellees at 1-2, 540 U.S. 93 (2003) (No. 02-1755). Its brief characterized the AFL's ads within the scope of Title II as follows:

> The AFL-CIO spends millions of dollars annually for television, radio and cable advertisements on a wide variety of social and economic issues. This program began in the wake of the 1994 national election, when the organization ran numerous radio and television ads to mobilize union households and the general public to oppose the new Republican-controlled Congress's attempts to enact the "Contract with America," including major cuts in federal funding for jobs, health and safety, housing, school lunches and the Medicare and Medicaid programs. . . . Virtually all of these ads urged viewers or listeners to call named Members of Congress to oppose the budget cuts. Several of these ads would have been banned if BCRA § 203 had been in effect. . . .

Id. at 2 (footnotes and internal citations omitted).

This Court rejected these arguments in *McConnell*, upholding Title II in its entirety and concluding that so-called "issue ads," including grassroots lobbying ads, were permissibly encompassed within Title II. The Court explicitly recognized that Title II was constitutional even though in rare cases it could cover "genuine issue ads," 540 U.S. at 206, because such ads could be run "by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* (footnote omitted).

Before the District Court, WRTL admitted that its argument about the impact of BCRA's electioneering communication provisions on grassroots lobbying – the foundation of its case before this Court – had already been "argued strenuously" to this Court in *McConnell*. Pl. Mem. at 20, *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260 (D.D.C. May 9, 2005) (thee-judge court). WRTL then complained that this Court "utterly ignored the argument," *id.*, and concluded from this Court's supposed silence that therefore "such considerations were left for another, as-applied challenge," *id.*

But given the centrality of the argument about grassroots lobbying ads made by the numerous challengers in *McConnell*, it is clear that this Court did not "ignore" the argument, but rather fully considered and rejected it. This Court surely understood – multiple plaintiffs highlighted precisely this point – that the statute could encompass preelection ads *even if* those ads simply urged a Member of Congress to vote one way or the other on a piece of pending legislation. This Court did not hold such ads outside the proper scope of Title II and did not suggest that the statute might be unconstitutional as applied to such ads. Confronted then with all of the same arguments that WRTL now makes here, this Court did not state or even imply that it was postponing for another day a future challenge to the statute as applied to such ads. Rather, this Court upheld the "bright line" test drawn by the statutory definition of electioneering communications notwithstanding any incidental effect on grassroots lobbying.

2. The Ads Themselves Are Identical.

To support its argument that so-called "grassroots lobbying" should be exempted from the coverage of electioneering communications, WRTL submitted to the District Court three ads featuring Wisconsin's Senator

Russell Feingold that it planned to run shortly before the 2004 congressional elections. *See* Jurisdictional Statement app. at 13a-17a (containing storyboards of ads). These ads are virtually identical to many of those the plaintiffs submitted in *McConnell*.

All three of WRTL's ads, with only slight variation, attacked "a group of Senators [for] using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote." Two argued that these senators' actions meant that "qualified candidates [don't get] a chance to serve" while the third argued that these senators were "blocking qualified nominees." All three claimed "[i]t's politics at work . . . causing gridlock" and urged the audience to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." Two made the hyperbolic claim that the filibuster was leading to "a state of emergency." Not a single ad, moreover, explained to the listener *how* to contact Senators Feingold and Kohl. Nowhere in the ads did the Senators' phone numbers, mail addresses, email addresses, fax numbers, or URLs appear. (The ads contain the address for a website funded by WRTL, where contact information for the Senators may have been available, but no such information was in the ads themselves.) Without such information, of course, grassroots lobbying is particularly difficult. How does one lobby a representative if one does not know how to contact him? These ads were either peculiarly inept or aimed at something other than grassroots lobbying: traditional electioneering.

This Court considered ads very much like these when it upheld BCRA's Title II in *McConnell*. Senator McConnell, the lead plaintiff, submitted storyboards of fifteen ads as the complete Appendix to his Supreme Court brief. *See* Br. For Appellants/Cross-Appellees Senator Mitch McConnell *et al.*, app. at 1a-15a, 540 U.S. 93 (2003). Three of these ads are virtually identical to WRTL's:

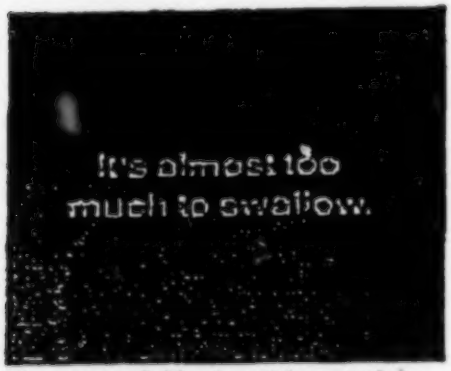
4a

CMR

Ad Detector

BRAND:	DEMOCRATIC ST CNTRL CMT+
TITLE:	CCS/No Matter Who Goes To DC
COMMERCIAL:	CCS/No Matter Who Goes To DC
LENGTH:	30
FRAMES:	7

A005P3G0.ESB

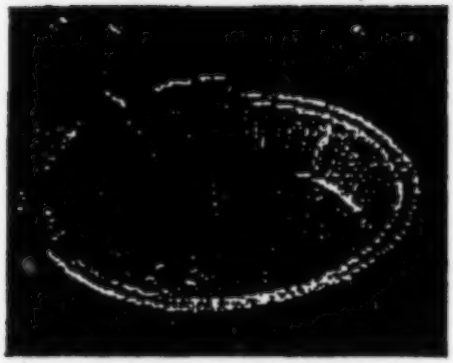


[Announcer] It's almost too much to swallow. Year after year the federal government takes a bigger piece of the pie.

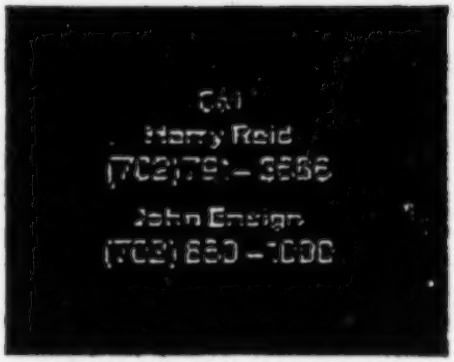
In fact in 1998 we'll pay more in federal taxes than at any time in American

history except for World War II. And now with the budget surplus,

in thirty years all the Washington politicians can talk about is getting their hands



on more of your dough. Call Harry Reid and John Ensign tell them no matter who



goes to Washington you want them to cut your taxes. Otherwise they'll be

nothing left but the crumbs.

Id. at 4a.

5a

CMR

BRAND: ALLIANCE/QLTY NRSNG HMCR+
TITLE: AQNHC/Call Al Gore Restore Cuts
COMMERCIAL: AQNHC/Call Al Gore Restore Cuts
LENGTH: 30
FRAMES: 7

Ad Detector

A007ESGJ.ES3

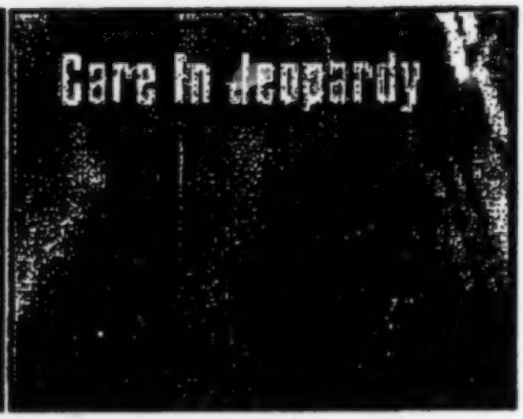
[Announcer]: Call. Tell Al Gore to fight to restore nursing

home funding. [Shawberg]: "Please Vice President Gore, restore the medicare cuts

and keep the promise."

[Announcer]: Medicare cuts to nursing homes threaten quality care. This year the Clinton-Gore Administration is spending $3.5

billion less than Congress provided for nursing home care. No wonder



care for seniors is in jeopardy. [Shawberg]: "This isn't about politics,

it's about people. These cuts are hurting patient care. It's just wrong."

Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

Id. at 5a.

2a

CMR

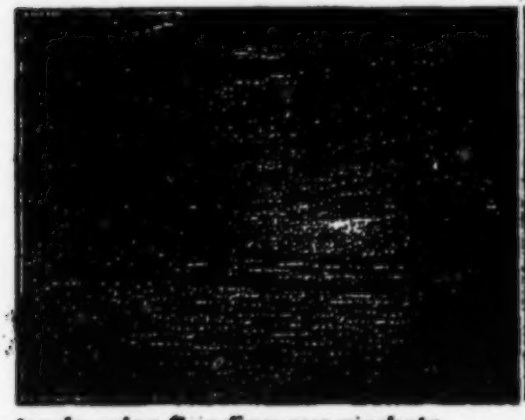
Ad Detector

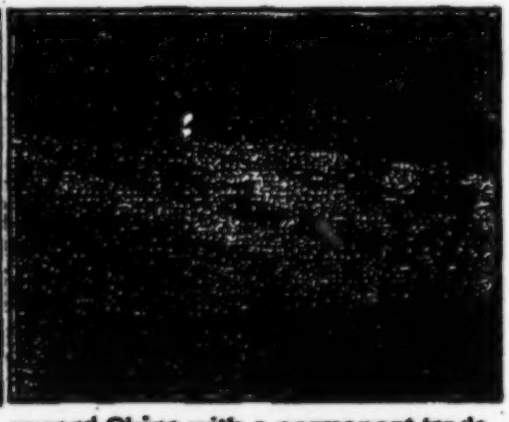
BRAND:	POL-UNKNOWN+
TITLE:	AFL/Made In China Myrick
COMMERCIAL:	AFL/Made In China Myrick
LENGTH:	30
FRAMES:	6

A0074HN3.ES8

[Announcer]: Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as

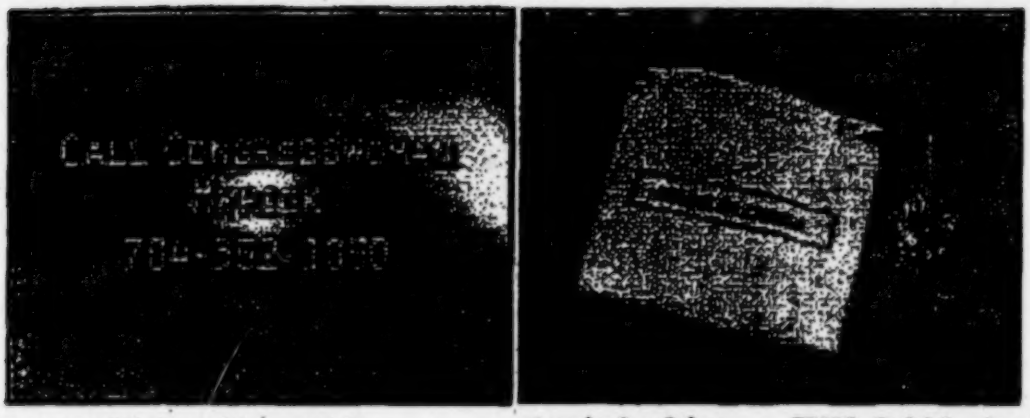
13 cents an hour, of a country that routinely violates





trade rules flooding our markets draining American jobs. Now Congress is set to scrap its annual review of China's record and

reward China with a permanent trade deal. Tell Congresswoman Myrick



to vote "No" and keep China on probation until this label

stands for fairness. [DIS]: Paid for by the AFL-CIO.

Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

Id. at 2a.

There is no real difference between the three ads WRTL asks to be exempted here and these three presented in *McConnell*. Each of the three *McConnell* ads states a policy position and urges the audience to contact a politician running for election in order to press him to vote a certain way. The first *McConnell* ad, in fact, meets *all* of the criteria WRTL believes "indicate that [its own ads] were authentic grassroots lobbying and not electioneering," the second arguably meets all of them, and the third meets all but one. (Unlike the WRTL ads, it is true, none of the *McConnell* ads listed a website where the viewer could find more information about the sponsoring organization, its positions on issues and the candidates, and how to contact the candidates themselves.) WRTL identifies these criteria as follows:

> As to *topic*, they concerned only a legislative matter that was specific and dealt with an issue in which WRTL had a clear and long-held interest. As to *timing*, the legislative action was under active consideration by the Senate then in session; the filibuster problem was coming to a head at the time; the timing was beyond the control of the communicator; and the ads were run outside the prohibition period as well as being planned to run within it. As to candidate *reference*, the only reference to a clearly-identified federal candidate was a statement urging the public to contact the candidate and to ask that he take a particular position on the legislative matter; the ads contained a link to contact information for the Senators (by reference to a website); and the ads identified two incumbent Senators, only one of which was up for election, and referred to the candidate and non-candidate equally. As to *tone*, the ads contained no reference to any political party, to the candidate's record or position on any issue, to the candidate's character, qualifications,

> or fitness for office, or to the candidate's election or candidacy; and they contained no words that promoted, supported, attacked, or opposed the candidate. . . . The ads were broadcast independent of any candidate or political party. These details demonstrate that, under any reasonable test, the ads were genuine grassroots lobbying.

Br. for Appellant at 4 n.4. The only criterion the second and third *McConnell* ads do not clearly meet is that they do not reference politicians who are *not* candidates in the upcoming federal elections. (The second ad, however, does feature another person, but she is not a politician.) This one distinction cannot make a constitutional difference. Otherwise, all the electioneering communications in *McConnell* could have avoided coverage by simply mentioning a non-candidate somewhere in the ad.

3. Since "Grassroots Lobbying" Ads Often Are the "Functional Equivalent of Express Advocacy," They Should Receive No Exemption.

All the remaining twelve ads the lead plaintiff presented to this Court in *McConnell* are identical to those WRTL presents now but for one additional distinction. The remaining twelve *McConnell* ads all identify or suggest the position that the mentioned candidate takes on the particular policy. Four of these ads, for example, argue in favor of term limits and indicate where one or more candidates stand on the issue before exhorting the listener to make contact. *See* Br. for Appellants/Cross-Appellees Senator Mitch McConnell *et al.*, app. at 1a, 7a, 11a & 13a. The others make the same type of pitch with respect to other hot-button issues. They all avoid urging listeners to vote any particular way or even mentioning the up-coming candidate election. They do not need to mention these things, of course. The voter knows that much and can be counted on to place each ad within its obvious context and

understand its point – to vote for or against particular candidates. As this Court recognized in *McConnell*, these ads' indirect direction is direction nonetheless and makes the ads "the functional equivalent of express advocacy." 540 U.S. at 206. Considered in their actual context, WRTL's three ads would have had the same effect.

At the time of the 2004 election, Senate filibustering of judicial nominees was a key issue in the Wisconsin Senate race, as well as a national, partisan campaign issue. All three Republican Senate candidates had made it a key issue in their primary races, as had the state Republican Party, which listed this issue as one of four reasons to defeat Senator Feingold. *See* Def. Federal Election Commission's Exs. Submitted in Supp. Of Its Opp'n to Pl.'s Mot. For a Prelim. Inj., Ex. 15 at 2, *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260 (D.D.C. May 9, 2005) (three-judge court). Further, WRTL itself and its affiliated PAC made the judicial filibuster a campaign issue, citing it both as a reason they had endorsed the three Republican opponents of Senator Feingold and as a reason that one of their "top election priorities" was "to send Feingold packing!" *See id.* Ex. 4 (WRTL PAC); Ex. 20 (WRTL). WRTL's PAC said that "the defeat of Feingold must be uppermost in the minds of the Wisconsin right to life community in the 2004 elections." *See id.* Ex. 4 at 2. And the PAC chair stated, "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." *See id.*

These statements were entirely consistent with WRTL's past electoral positions. Through its PAC, it has made significant independent expenditures to defeat Senator Feingold, as has the National Right to Life PAC. In fact, WRTL PAC's FEC reports itemizing its independent expenditures in the 1992 and 1998 congressional elections list 100 percent of its independent expenditures as opposing Senator Feingold. *See id.* Exs. 8 & 9.

WRTL also heavily publicized Senator Feingold's support of the judicial filibuster and issued several press releases criticizing him for his vote. In this context, the fact that its proposed electioneering communication ads did not *themselves* specifically state Senator Feingold's position on the issue matters little, since WRTL had already used other means to publicly disseminate Senator Feingold's position, as did his three Republican opponents and the Republican state party, all of whom had attacked Senator Feingold repeatedly for his position.

Thus, when WRTL's electioneering communication ads referred to Senator Feingold in the context of criticizing "a group of Senators" for conducting an ongoing filibuster that is "not fair" and "causing gridlock," it was implausible to maintain that this criticism would not attach to Senator Feingold and affect his Senate race.

In this context, WRTL's representation that its proposed electioneering communication ads to Wisconsin voters in the immediate preelection period have *only* a grassroots lobbying purpose strains credulity past the breaking point. The facts that the topic of these ads – the Senate filibuster of judicial nominees – was one that both the Republican Senate candidates and WRTL identified as a key campaign issue and that the ads gave their listeners no direct information about how to contact any candidates undermine WRTL's claim that these electioneering communications amount to no more than grassroots lobbying.

4. WRTL's Suggested Test for "Grassroots Lobbying" Would Exempt Nearly All Electioneering Communications That Avoid Express Advocacy.

WRTL does not formally propose a test to identify grassroots lobbying communications. Its brief, however, approvingly cites the Internal Revenue Service's ("IRS")

definition and suggests that that approach should apply here. Br. For Appellant at 20-22. The IRS provides that

> [a] "Grass roots lobbying communication" is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof" and has three "required elements:" (1) "refers to specific legislation" (2) "reflects a view on such legislation," and (3) "encourages the recipient of the communication to take some action with respect to such legislation."

26 C.F.R. § 56.4911-2(b)(2)(i)-(ii) (2005). As WRTL notes, "grassroots lobbying" is contrasted to "political intervention," which is more heavily regulated. "Political intervention" is defined as

> the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

26 U.S.C. § 527(e)(2) (2005). Adopting just the IRS's definition of grassroots lobbying, as WRTL's brief seems to suggest, poses several problems.

First, it would not even fit the facts of this case. Although WRTL repeatedly argues that its ads are intended to influence public opinion on "legislation," they do not do so under the IRS's definition. All three ads take a position on filibustering of judicial nominees. Under the IRS framework, this constitutes restricted "political intervention" since it "attempt[s] to influence the selection . . . or appointment of any individual to any Federal . . . office. . . ." *Id.* The ads, moreover, do not meet a single one of the definition's requirements for grassroots lobbying. They neither "refe[r] to specific legislation," "reflec[t] a

view on such legislation," nor "encourag[e] the recipient of the communication to take some action with respect to such legislation." 26 C.F.R. § 56.4911-2(b)(2)(i)-(ii) (2005). Filibustering of nominees simply does not concern "legislation." *See id.* § 56.4911-2(d)(1) (defining "legislation"). And, even if it did, WRTL's failure to include any contact information in the ads themselves would independently disqualify them. *See id.* § 56.4911-2(b)(iii)(B) (requiring that communication "[s]tate the address, telephone number or similar information of a legislator"). In other words, even the capacious test WRTL suggests here would offer its own ads no protection.

More importantly, this test would exempt from coverage many electioneering communications that are "the functional equivalent of express advocacy," which this Court found Congress can regulate. *McConnell*, 540 U.S. at 206. Several of the ads Senator McConnell cited as protected issue advocacy in his leading brief, for example, meet the IRS test of legislation. Still more troubling, the one ad this Court cited in *McConnell* as a clear example of sham issue advocacy would pass it as well with two minor emendations. In *McConnell*, this Court noted that although ads avoiding express words of advocacy "do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id.* at 193. In a footnote, it then gave a strong example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks

> about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

Id. at 193-94 n.78 (internal citations omitted). Even though the notion that this ad discusses mere issues "strains credulity" the ad itself would be protected as "grassroots lobbying" under WRTL's suggested definition if only the final two words of the ad itself, "family values," were changed to refer to specific legislation and it contained a phone number where Bill Yellowtail could be reached. In that case, it would meet all three parts of the IRS test. It would (1) "refe[r] to specific legislation," (2) "reflec[t] a view on such legislation," and (3) "encourag[e] the recipient of the communication to take some action with respect to such legislation." WRTL's proposed definition, in other words, could exempt even the most egregious ads in *McConnell* as "grassroots lobbying."

B. As Applied to Tax-Exempt Organizations, BCRA's Electioneering Communications Provisions Are Clearly Constitutional.

WRTL, Br. for Appellant at 21 n.18, and the "public charities" that support it, *see Amicus* Br. of A Coalition of Public Charities, all argue that BCRA's electioneering communications provisions place so-called § 501(c)(3) organizations in a special bind. According to them, § 501(c)(3) organizations, unlike § 501(c)(4)s, have no alternative ways to make electioneering communications. They are simply silenced. This is not true and their larger argument – that their central function in provoking public discourse, on which their favorable tax treatment is based,

heightens any First Amendment concern applying to corporations generally – gets the law exactly backwards.

Rather than raising special First Amendment concerns, § 501(c)(3) organizations' favorable tax status reduces any worry. In short, they are demanding not just the right to run electioneering communications in the service of so-called "grassroots lobbying," but the right to do so with public money. The First Amendment, however, does not require the public to help pay for their political activity. As this Court has long recognized, "since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned." *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

1. The First Amendment Does Not Require Congress to Subsidize Any Form of Political Speech.

WRTL and the § 501(c)(3)s supporting it all receive generous tax benefits from the federal government. WRTL enjoys an exemption from federal income taxes under § 501(c)(4) of the IRC and its supporting charities enjoy a similar exemption under § 501(c)(3). *See* 26 U.S.C. §§ 501(c)(3) & (4) (2000). In addition, taxpayers who contribute to these § 501(c)(3) organizations may deduct the amounts of their contributions on their federal income tax returns under § 170(c)(2). *See* 26 U.S.C. § 170(c)(2) (2000). The federal government grants both types of organizations, but particularly § 501(c)(3)s, a great amount of financial support through the tax system.

This Court has long recognized, in fact, that

> [b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same

> effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.

Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) (footnote omitted); *see also Leathers v. Medlock*, 499 U.S. 439, 450 & n.3 (1991); *Cammarano*, 358 U.S. at 512-13.

No entity has a right to such support from the federal government. "[T]ax exemptions and deductions," like appropriations, "are a matter of grace [that] Congress can, of course, disallow . . . as it chooses." *Taxation With Representation*, 461 U.S. at 549 (quoting *Commissioner v. Sullivan*, 356 U.S. 27, 28 (1958)) (internal quotation marks omitted). This is true even when the entity wishes to exercise a constitutional right. "[A] legislature is not required to subsidize First Amendment rights through a tax exemption or deduction." *Leathers v. Medlock*, 499 U.S. at 450; *see also Taxation With Representation*, 461 U.S. at 545 ("This Court has never held that Congress must grant a [tax] benefit . . . to a person who wishes to exercise a constitutional right."); *id.* at 546 ("We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.") (quoting *Cammarano*, 358 U.S. 498, 515 (Douglas, J., concurring)) (internal quotation marks omitted).

Subject to one exception, so long as the government does not "discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas,'" *Taxation With Representation*, 461 U.S. at 548 (quoting *Cammarano*, 358 U.S. at 513), and allows alternative means for political expression, it may restrict the political

activities of those who receive tax subsidies.[2] In *Cammarano*, in fact, this Court explicitly rejected a claim that disallowing tax deductions spent on grassroots lobbying – there described as "expenditures made in connection with efforts to promote or defeat the passage of legislation by persuasion of the general public as opposed to direct influence on legislative bodies," 358 U.S. at 504 – violated the First Amendment. "Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation," it held, "is plainly not 'aimed at the suppression of ideas.'" *Id.* at 513 (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)). In *Cammarano*, moreover, this Court noted that it had previously disallowed deductions for grassroots lobbying expenses, such as expenditures for "matters of publicity, including the making of arrangements for speeches, contacting the press, in respect of editorial comments, and news items, and for the preparation of brochures involving a comprehensive study of the [underlying issue] all designed to influence the opinions of the general public." *Id.* at 504-05 (describing *Textile Mills Security Corp. v. Commissioner*, 314 U.S. 326 (1941)) (internal quotation marks and citations omitted). More recently, this Court has made clear that this test requires only "viewpoint neutrality." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995). The electioneering communications regulations clearly meet this test. These sensible restrictions do not promote any viewpoint, ideology, political party, or candidate above any other. Thus, BCRA's restriction on WRTL's use of its tax-exempt treasury funds for "electioneering communications" is well within the bounds of existing

[2] The one exception is for ideological nonprofit advocacy organizations which meet the three-part test of *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263-64 (1986). WRTL and its supporting "public charities" choose not to meet this test.

doctrine, which allows the government to impose conditions on the receipt of public subsidies.

2. Like WRTL, § 501(c)(3) Organizations Have Alternative Means To Disseminate Electioneering Communications.

As WRTL admits, it has the right to spend for any electioneering communications out of its connected PAC. Br. for Appellant at 5-6. It did not want to do so, however, because those funds "would not have been sufficient" and because it wanted to preserve them for federal contributions and independent expenditures. *Id.* at 6. This is, of course, its right. But the desire to preserve its PAC funds does not make the requirement to use PAC funds for electioneering communications a constitutionally insufficient alternative – for WRTL or for any other corporation.

In the case of WRTL, however, the point is even stronger, for WRTL has no right to demand that the public augment its funds through tax subsidy. Although WRTL "does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Taxation With Representation*, 461 U.S. at 550 (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)) (internal quotation marks omitted).

As this Court noted in *FEC v. Beaumont*,

> [t]he PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure without jeopardizing the associational rights of advocacy organizations' members.

539 U.S. 146, 163 (2003) (internal citations omitted). Except in the special case of ideological non-profits meeting the strict requirements of *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238, 263-64 (1986), this Court has found – unanimously – that this alternative provides corporations and unions with a "constitutionally sufficient, opportunity" to disseminate electioneering communications. *See McConnell*, 540 U.S. at 203 & n.86.[3]

WRTL and the § 501(c)(3) corporations that support it claim that no such alternative is available to § 501(c)(3) organizations. Br. for Appellant at 42 n.30; Br. of A Coalition of Public Charities at 14-15. This is simply wrong. Although § 501(c)(3) organizations cannot themselves set up and administer PACs, they can set up separate § 501(c)(4) organizations which can. Indeed, WRTL is itself such an affiliate of a § 501(c)(3) organization, The Wisconsin Right to Life Foundation, Inc., *see* The Wisconsin Right to Life Foundation, *at* http://www.wrtl.org/foundation.htm (describing its 501(c)(3) affiliate as "exist[ing] to sustain the long-term viability of Wisconsin Right to Life. . . ."), and already has a PAC capable of running electioneering communications, *see* Br. of Appellant at 5-6.

This Court has clearly held that a § 501(c)(3) organization's ability to create an affiliate which itself can engage in protected speech activities cures any constitutional problem with restricting the activities of the § 501(c)(3) organization itself. In *Taxation With Representation*, for example, this Court noted that Taxation With Representation (TWR), which challenged the IRS's denial of § 501(c)(3) status on account of its lobbying activities,

---

[3] WRTL, of course, could also make unlimited electioneering communications if it simply foreswore corporate and union contributions. *McConnell v. FEC*, 540 U.S. at 209-11 (listing criteria for constitutional exemption to electioneering communications). This it refuses to do.

> could still qualify for a tax exemption under § 501(c)(4). It also appears that TWR can obtain tax-deductible contributions for its nonlobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for nonlobbying activities and a § 501(c)(4) organization for lobbying. TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize.

461 U.S. at 544 (footnote omitted). The concurring opinion made the point explicit. Notwithstanding that § 501(c)(3)'s ban on lobbying "denies a significant benefit to organizations choosing to exercise their constitutional rights," *id.* at 552 (Blackmun, J., concurring) (footnote omitted), "[a] § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its non-lobbying activities," *id.* at 553.

In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court reaffirmed this reasoning. In striking down a statutory provision that forbade any noncommercial educational broadcasting station receiving a grant from the Corporation for Public Broadcasting from engaging in editorializing, this Court found the absence of such an alternative fatal. The "statutory [§ 501(c)(4)] alternative," in *Taxation With Representation*, it explained, meant "that Congress ha[d] not infringed any First Amendment right or [even] regulated any First Amendment activity; it had simply chosen not to pay for TWR's lobbying." *Id.* at 400 (quoting *Taxation With Representation*, 461 U.S. at 546) (internal quotation marks omitted). Moreover,

> if Congress were to adopt a revised version of [the FCC provision] that permitted noncommercial educational broadcasting stations to establish "affiliate" organizations which could then

> use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of *Taxation With Representation*. Under such a statute, public broadcasting stations would be free, in the same way that the charitable organization in *Taxation With Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities. But in the absence of such authority, we must reject the Government's contention that our decision in *Taxation With Representation* is controlling here.

Id. at 400-01 (internal citations and footnote omitted).

If § 501(c)(3) organizations can set up affiliated § 501(c)(4) entities, which in turn can set up affiliated PACs, there can be no constitutional objection to § 501(c)(3) organizations' inability to make electioneering communications directly. They can make as many as they want; they just cannot use public money. This Court has, of course, defined a small category of organizations for which this alternative is not adequate. *See FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 263-64 (1986). WRTL and its supporting "public charities," however, have chosen not to be among them.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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No. 04-1581

IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws.

For the past three decades, the ACLU has been deeply engaged in the effort to reconcile campaign finance legislation and First Amendment principles, from *Buckley v. Valeo,* 424 U.S. 1 (1976), where we represented our affiliate, the New York Civil Liberties Union, to *McConnell v. FEC,* 540 U.S. 93 (2003), where the ACLU was both co-counsel and plaintiff. In the intervening years, the ACLU has participated in numerous campaign finance cases, both in this Court and in the lower state and federal courts. Currently, we are counsel in *Randall v. Sorrell,* 382 F. Supp. 91 (2d Cir. 2004), *cert. granted,* 126 S.Ct. 35 (2005)(No. 04-1528), which will be argued later this Term.

Even in the context of that long history, the present case raises issues of particular significance for the ACLU. With increasing frequency in recent years, the ACLU has relied on broadcast ads to promote its position on civil liberties issues. Those issues, and the need to discuss them, arise throughout the year. But those discussions are often most urgent, and the public most engaged, in the period preceding elections when crucial legislative votes are frequently scheduled.

Until passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), the ACLU was free to determine the manner and content of its political speech so long as it respected the

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus curiae,* its members, or its counsel made a monetary contribution to the preparation of this brief.

limits on partisan political activity imposed by its tax-exempt status under the Internal Revenue Code and its own bylaws, and so long as it did not expressly urge a vote for or against a particular candidate. Under the BCRA, the ACLU now faces criminal penalties if it broadcasts any ad during a defined pre-election period that mentions the name of a federal candidate, even if no reasonable person would construe the ad as advocating that candidate's election or defeat.

The question presented by this case is whether that categorical ban can be enforced in circumstances where its underlying rationale simply does not apply. Put in more direct and immediate terms, can a prohibition against "sham" issue ads be enforced in a manner that prohibits the ACLU from broadcasting "genuine" issue ads that are not only protected by the Constitution but involve speech that lies at the very heart of the First Amendment?

This Court's answer to that question will have a substantial impact on the free speech rights of the ACLU and its members.

STATEMENT OF THE CASE

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court addressed a facial challenge to numerous provisions of the BCRA, including § 203, which bars corporations and unions from engaging in "electioneering communications" with general treasury funds. 2 U.S.C. § 441b (b)(2). That prohibition applies to non-profit corporations as well as for-profit corporations.

An "electioneering communication" is defined by § 201 of the BCRA as any "broadcast, cable, or satellite communication" that (1) refers to "a clearly identified candidate" for federal office, (2) is made during a blackout period that applies 60 days before a general election and 30 days before a primary election or party convention, and (3) is

targeted at the candidate's constituency. 2 U.S.C. § 434(f)(3)(A).

The definition of an "electioneering communication" set forth in the BCRA was intended to close what Congress perceived as a loophole in prior law. Specifically, the pre-existing bar on corporate or union expenditures "in connection with a federal election," 2 U.S.C. § 441b(a), had been widely construed to reach only ads that met the so-called "magic words" test – that is, ads that expressly urged voters to cast their ballot either for or against a specific candidate. Section 203 of the BCRA was designed to reach further and to prohibit what many in Congress perceived to be "sham" issue ads that omitted the "magic words" but were nevertheless intended to deliver a partisan message and influence electoral choices.

This Court accepted the legitimacy of that concern in *McConnell* when it upheld the facial validity of the BCRA's ban on "electioneering communications." At the same time, the Court recognized that some ads that fit within the literal definition of an "electioneering communication" do not in fact have an "electioneering purpose." *McConnell*, 540 U.S. at 206. The Court described those ads as "genuine" issue ads rather than "sham" issue ads. The Court further acknowledged that both the parties and the members of the three-judge district court in *McConnell* had disagreed on how many ads fit within each category. No one, however, doubted the existence of such ads, including the staunchest proponents of the BCRA. In the end, this Court found it unnecessary to resolve that dispute in the context of the substantial overbreadth challenge that plaintiffs had presented in *McConnell*. Based on its review of the record, the Court was convinced that the "vast majority" of "electioneering communications" had an "electioneering purpose" and that was sufficient to defeat plaintiffs' substantial overbreadth claim. *Id* at 206.

McConnell was decided in December 2003. Eight months later, Wisconsin Right to Life (WRTL) filed this action seeking a declaratory judgment that the BCRA's ban on "electioneering communications" was unconstitutional as applied to three specific ads that it had been running on Wisconsin radio. It also sought a preliminary injunction that would allow it to continue broadcasting the ads specified in its complaint during the BCRA's blackout period, which extended for 79 days from August 15 to November 2, 2004, because of the state's election calendar.[2]

WRTL's motion for a preliminary injunction was denied by the district court on the ground that this Court's decision in *McConnell* "leaves no room for the kind of 'as applied' challenge that WRTL propounds before us." J.S. App 7a. WRTL's complaint was subsequently dismissed on the same basis. This appeal followed.

SUMMARY OF ARGUMENT

The ACLU is a nonpartisan organization. It does not engage in partisan political speech. It is, however, an active participant in public debates about civil liberties issues. We seek to educate the public about our views on those issues, and to influence the decisions of lawmakers and policymakers. The ability to broadcast radio and TV ads to targeted audiences is an important part of the ACLU's advocacy strategy. Indeed, the sponsors of the BCRA chose to target those ads – as opposed, for example, to newspaper ads that were left unregulated – precisely because of their communicative impact. The free speech rights of the ACLU

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[2] The 2004 Democratic primary in Wisconsin took place on September 14th, so the 30-day blackout period began on August 15th. By the time the primary was held, the 60-day blackout period preceding the general election on November 2nd had already begun. J.S. App. 5a.

are thus directly and significantly impaired by § 203 of the BCRA.

The First Amendment protects more than the speaker's right to choose what to say. It also protects the speaker's right to choose how to say it. For that reason, this Court has long held that the government must satisfy strict scrutiny whenever it regulates the content of speech. Additionally, the government must satisfy strict scrutiny whenever it deprives a speaker of access to an entire medium of communication. Section 203 of the BCRA undeniably does both.

Applying strict scrutiny, this Court nonetheless held in *McConnell* that § 203 was facially valid because of the government's compelling interest in preventing corporations and unions from using their general treasury funds – amassed for a different purpose and with the benefit of government conferred advantages – to influence the outcome of federal elections. But that fact cannot and does not justify applying § 203 in circumstances where its underlying interests manifestly do not apply. To rule otherwise, would be in effect to hold that First Amendment rights can be abridged even in the absence of any compelling justification.

At the very least, any such holding would be a dramatic departure from this Court's traditional First Amendment jurisprudence. Prophylactic rules are always easier to enforce but this Court has repeatedly rejected their application in First Amendment cases precisely because the burden they impose on constitutionally protected speech has been deemed unacceptable. The three-judge court in this case understandably focused on the language of *McConnell*. And, to be sure, there is language in *McConnell* that could be read as foreclosing future as-applied challenges to the operation of § 203. Read in context, however, that language is more ambiguous than the court below credited. It is, moreover, plainly dicta since the Court in *McConnell* was

not considering an as-applied challenge. Nothing in *McConnell*, therefore, prevents the Court from recognizing the propriety of as-applied challenges to § 203 now that the question has been squarely presented for the first time.

Of course, recognizing the possibility of an as-applied challenge does not determine whether a particular as-applied challenge will or will not succeed. As in every other First Amendment context, a plaintiff must still establish that its First Amendment rights have been burdened, and the government must be given an opportunity to prove that the burden is justified by a compelling state interest that has been narrowly pursued. For the ACLU, the burden imposed by § 203 is clear and is not ameliorated by the two possible escape routes that this Court identified in *McConnell*: either creating a PAC or seeking designation as an *"MCFL"* corporation. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

Requiring the ACLU to speak through a PAC is not the equivalent of asking a group of demonstrators to re-route their march down Sixth Avenue rather than Fifth Avenue. PAC's are associated in the public mind with partisan political activity. The formation of a PAC would therefore threaten one of the ACLU's most valuable organizational resources – its nonpartisan reputation as an impartial advocate on behalf of civil liberties. Furthermore, the detailed rules governing PAC contributions enhance the risk of diverting funds that would otherwise be available as general support for the ACLU's overall program. These burdens might have to be borne if the ACLU were in fact broadcasting "sham" issue ads designed to influence federal elections. It is not, and no one in the *McConnell* litigation, where the ACLU was a plaintiff, ever claimed otherwise. Under existing FEC rules, moreover, the ACLU simply does not qualify for "MCFL" designation.

There are a variety of ways that an as-applied challenge to § 203 of the BCRA could be framed and resolved. First, as here, nonprofit advocacy groups could seek judicial approval for particular ads that they wish to broadcast during the pre-election blackout period. That approach, however, has both practical and doctrinal disadvantages. It exacts a heavy toll on the limited resources of both nonprofit speakers and the judiciary although, over time, a common law set of rules might develop that provide sufficient guidance for all involved to reduce the need for repetitive litigation.

Second, nonprofit speakers can broadcast ads at their own peril and then raise a First Amendment defense in any administrative enforcement proceeding or criminal prosecution. The disadvantage of that approach is that its chilling effect will inevitably lead to self-censorship by speakers unwilling to run the risk of civil or criminal sanctions.

Third, the Court could adopt a speaker-based rather than a speech-based approach. Just as organizations can seek an exemption from disclosure rules by demonstrating that their contributors will suffer retaliation if their identities are disclosed, *see Brown v. Socialist Workers '74 Campaign Committee (Ohio),* 459 U.S. 87 (1982), nonprofit advocacy organizations could seek an exemption from § 203 based on their history and practice of avoiding partisan political activity. Such an exception would not permanently immunize organizations like the ACLU if they crossed the line, but it would create a presumption in their favor that would at least reduce the peril of otherwise speaking at their own risk.

Fourth, this Court could rule that the interests asserted in defense of § 203 simply do not apply to speech by nonprofit corporations organized under 501(c)(4) of the Internal Revenue Code that is entirely funded by individual contributions, thus effectively reinstating the Snowe-Jeffords Amendment to the BCRA as a constitutional rule and relying

on IRS to police any alleged transgressions of the tax laws. We recognize that this final alternative would require the Court to revisit some of its conclusions in *McConnell*. But, it would also provide the greatest free speech protection while still respecting the underlying values that led Congress to pass the BCRA and this Court to uphold it against a facial challenge.

Any of these alternatives, however, is preferable to a legal regime in which § 203 can never be challenged even when it silences speech that does not pose any of the problems that § 203 was enacted to prevent.

ARGUMENT

I. SECTION 203 OF THE BCRA IMPOSES A DIRECT, SUBSTANTIAL, AND UNJUSTIFIABLE BURDEN ON THE ACLU'S CORE POLITICAL SPEECH

The ACLU was founded in 1920. In 85 years, it has never endorsed or opposed a candidate for elective office.[3] Nonetheless, because the ACLU is organized as a nonprofit corporation under § 501(c)(4) of the Internal Revenue Code, it is barred by the BCRA from broadcasting any ad that mentions the name of a federal candidate in the period preceding a primary or general election based on the statute's irrebuttable presumption that such ads are intended to influence the outcome of a federal election even when they manifestly are not.

The ACLU's sole mission is to preserve and protect civil liberties. In furtherance of that mission, we seek to influence the actions of federal officials on a regular and ongoing basis. Since 9/11, for example, we have frequently criticized the balance that federal officials have struck

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[3] ACLU Board Policy 519 categorically states: "The ACLU does not endorse or oppose candidates for elective or appointive office."

between liberty and security. We have met with executive branch officials to voice our concerns. And we have attempted to persuade Congress to recalibrate that balance in a variety of ways. As this brief is being written, Congress is reconsidering various provisions of the USA Patriot Act. The Senate has also recently passed a bill to bar torture that we have strongly supported.

As the ACLU has grown in size and budget, broadcast ads have become an increasingly important part of our advocacy strategy. The goal of such ads is two-fold. The first goal is to alert the public to important civil liberties issues. The second goal is to persuade the public to contact their elected representatives and urge those representatives to take a position that supports civil liberties. The timing of those issue ads is never determined by the electoral calendar. But the electoral calendar often determines when issues are brought up for a vote on the floor of Congress. That phenomenon is both easy to explain and well understood. For obvious reasons, elected officials like to build a record of accomplishment just prior to elections. In addition, politicians often perceive a political advantage in forcing their opponents to cast a controversial vote just before elections are held.

The 60 days preceding the 2004 election were typical in this regard. Congress took action on the following issues of longstanding concern to the ACLU.[4]

- On September 21st, the House voted on an amendment to the Transportation-Treasury Appropriations bill to prohibit the use of federal funds to enforce travel restrictions to Cuba. H.R. 5025, 108th Cong. (2004).

[4] These congressional actions are recorded in weekly editions of the Congressional Quarterly, as well as daily editions of the Congressional Record. They are also available on-line at http://www.cq.com.

- On September 23rd, the House voted on a billto strip the federal courts, including this Court, of jurisdiction to hear cases challenging the constitutionality of the Pledge of Allegiance. H.R. 2028, 108th Cong. (2004).
- On September 23rd, the Senate voted on an amendment directing the Secretary of Homeland Security to develop a plan to "integrate and consolidate" airline "no fly lists." S.2845, 108th Cong. (2004).
- On September 28th, the House voted on an amendment to the Defense Authorization bill to expand federal hate crimes legislation. H.R. 4200, 108th Cong. (2004).
- On September 30th, Congress voted on a joint resolution to propose a constitutional amendment banning same-sex marriage. H. R. J. Res. 106, 108th Cong. (2004).
- On October 5th, the House voted on a bill to require software companies to obtain permission from computer users before installing spyware programs that collect and distribute personal information. H.R. 2929, 108th Cong. (2004).
- On October 6th, the House voted on an amendment to fund grants to the states for DNA testing, including post-conviction testing for inmates. H.R. 5107, 108th Cong. (2004).
- On October 8th, the House voted on a series of amendments to the Intelligence Overhaul bill that authorized the death penalty for certain terrorist acts, and that altered the rules for the detention and removal of aliens from the country. H.R. 10, 108th Cong. (2004).

It is, of course, more difficult to predict what bills will be considered during the 60 days preceding the 2006 elections. Based on congressional action this year, reauthorization of the Voting Rights Act is a likely candidate. If the past is prologue, other likely candidates include: a constitutional amendment to ban flag desecration; a constitutional amendment to ban same-sex marriage; bills to restrict federal court jurisdiction; and bills to increase federal criminal penalties. Whether this list proves accurate or not, it is safe to predict that there will be numerous votes on legislative proposals of interest to the ACLU and its members as the 2006 midterm elections approach.

Members of Congress are influenced by the views of their constituents when voting on legislation. Mobilizing constituent support is therefore a principal lobbying tactic for advocacy organizations like the ACLU. Broadcast ads are an effective tool for accomplishing that end. To be effective, however, the ads must be targeted to run in the districts of pivotal legislators. Very few advocacy organizations can afford to spend their limited resources running broadcast ads in congressional districts where they will have little impact on the final legislative outcome. The ACLU certainly cannot. In addition, broadcast ads are most effective when they include a call to action: urging constituents to contact their legislative representatives. Finally, there is little point to running an ad unless the legislation discussed in the ad is under active consideration by Congress.

Unfortunately, the same characteristics that make a broadcast ad effective – namely, a targeted appeal for constituents to contact a specifically identified legislator prior to a scheduled vote – are precisely the characteristics that render the ad unlawful under the BCRA if the legislator is running for reelection and is mentioned in the ad by either name or title (*i.e.*, "call your senator" or "call your representative").

In the last year, the ACLU has broadcast a series of radio ads designed to further our legislative agenda. Under slightly different circumstances, each of those ads would have been a crime under the BCRA. For example, in October 2004, right in the midst of the BCRA's blackout period, Congress was considering a bill to implement the recommendations of the 9/11 Commission. The bill included several anti-immigrant provisions that the Commission had never sought and, indeed, opposed. In seeking to have those amendments dropped from the bill, the ACLU broadcast an ad in Spanish and English in five targeted states with significant immigrant populations. The ad began by stating:

> It doesn't matter if you were the first generation to arrive here.
>
> Or if it was your parents or great-grandparents who came here for a better life.
>
> We all feel a great sense of pride to live in the United States of America.
>
> And when terrorists attacked us on September 11th, we were one nation.

The ad then ended by urging listeners to call their senator and "[a]sk him to protect our rights by opposing the anti-immigration amendments in the 9/11 bill."

The language of the ad was identical in all five states except for the senators named in the tag line. Because none of the senators was running for reelection, the ACLU's ad was protected by the First Amendment. Had any of the senators been running for reelection, the ACLU's ad would have been a federal crime. Notably, the list of senators includes both Democrats and Republicans.

In both June and August 2005, the ACLU broadcast additional radio ads focused on the Patriot Act. The June 2005 ads ran in a total of twelve states and targeted four senators and eight representatives, each of whom was

strategically selected as a potentially critical vote in the Patriot Act reauthorization battle. The August 2005 ads ran in ten states and targeted four senators and nine representatives. One ad, a 60 second spot, was entitled "Concerned Patriots." The text of the ad focused on provisions of the Patriot Act that the ACLU opposed on civil liberties grounds and that public opinion polls had identified as particularly troublesome to the American public. The text of the ad stated:

> How would you like it if someone were to sneak into your home and search through your possessions? What if someone secretly helped themselves to your personal medical records of financial statements – without your knowledge or consent? You'd want to call the authorities, right?
>
> Now, what if I told you the people who did this *were* the authorities? This is one example of what's wrong with the PATRIOT Act as it currently stands.
>
> Unfortunately, right now the federal government is trying to make the PATRIOT Act permanent and expand it – even though it contains several provisions that violate our fundamental freedoms.
>
> These provisions give the courts the power to let the federal government secretly search our homes without letting us know for weeks, months, or even longer.
>
> Last time I checked, the Constitution was supposed to stop that kind of thing. Luckily, we still have the First Amendment so we can make our voices heard to correct the PATRIOT Act before it becomes permanent.

Depending on the venue, listeners were then asked to call either their congressman or their named senator and "[l]et him know [Congress] need[s] to make these crucial changes before renewing the PATRIOT Act." The ad was narrated by Bob Barr, a well-known conservative and former Republican congressman from Georgia. The American Conservative Union and the Americans for Tax Reform joined with the ACLU in paying for the ad, although both organizations disagree with the ACLU on numerous other policy issues.

The only thing that saved these ads from being a crime is that they were not broadcast during the BCRA's blackout period. Had the Patriot Act's sunset provisions been up for reconsideration in the fall of 2006 rather than the fall of 2005, the ACLU would have been severely inhibited in its ability to communicate with the American public on an issue that has been a central concern of the organization, and the country, since 2001.

At the same time that the ACLU was running its broadcast ads, it was also running print ads. For example, in October 2004, the ACLU placed ads in both the Albuquerque Daily Journal Tribune and the Santa Fe New Mexican concerning the proposed anti-immigrant amendments then pending in Congress. The ad asked readers to register their opposition by contacting President Bush and Senator Domenici, whose office phone numbers were listed.

Although the subject matter of the print ads paralleled the subject matter of broadcast ads that were running simultaneously, they were not interchangeable. Broadcast ads and print ads reach different audiences and have different impact. To the extent that budget permits, the ACLU pursues a comprehensive and integrated communications strategy to promote its civil liberties principles and influence relevant legislative decisionmaking in Congress. Optimally,

that strategy includes both print ads and broadcast ads. It also includes the Internet, direct mail, press releases, news conferences, public appearances, and publications, among other communications strategies.

For the ACLU, this combination of earned media and paid media has nothing to do with electing or defeating particular candidates. That is not our interest or intent, and the organization has an 85-year history to substantiate that claim. Any commentary on public issues could conceivably affect the electoral choices of some voter. But to treat every comment on public issues as an "electioneering communication" – assuming it meets the definition set out in the BCRA – is stand the First Amendment on its head.

To be sure, the ACLU could avoid the strictures of the BCRA by altering its message, its medium, or its messenger. Under the First Amendment, however, those choices should be ours to make and not the government's. If the government seeks to override the ACLU's fundamental right to speak, it needs to provide a compelling justification that actually applies to the ACLU. The government, of course, is entitled to legislate on the basis of general propositions, including the proposition that most "electioneering communications" are merely disguised attempts to influence election results. But, for reasons explained more fully below, the ACLU is equally entitled to bring an as-applied challenge arguing that those general propositions do not apply in its case. Allowing exceptions to a rule undoubtedly complicates its enforcement. But the government needs to establish something more than administrative convenience to justify the suppression of First Amendment rights.

II. THE BCRA'S BAN ON "ELECTIONEERING COMMUNICATIONS" MUST REMAIN SUBJECT TO AS-APPLIED CHALLENGE WHEN ITS PROPHYLACTIC RULE RESULTS IN THE SUPPRESSION OF SPEECH THAT DOES NOT TRIGGER THE CONCERNS THAT THE STATUE WAS MEANT TO ADDRESS

The ACLU broadcast ads described in the preceding section are clearly entitled to constitutional protection under this Court's traditional understanding of the First Amendment. That understanding rests on a series of well-established and fundamental principles.

First, "speech concerning public affairs is more than self-expression, it is the essence of self-government." *Connick v. Meyers,* 461 U.S. 138, 145 (1983), quoting *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Second, speech cannot be curtailed because of its proximity to an election. *Mills v. State of Alabama,* 384 U.S. 214 (1966). Third, freedom of speech necessarily "embrace[s] all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama,* 310 U.S. 88, 101 (1940). Fourth, neither the fact that the speech or criticism appears in a paid advertisement, *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), nor the corporate status of the speaker, *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Consolidated Edison Co. of New York v. Public Service Comm'n of New York,* 447 U.S. 530 (1980), provides a justification for suppressing speech on matters of public concern. Fifth, the Constitution protects the right of individuals to amplify their voice through group association. *DeJonge v. Oregon,* 299 U.S. 353 (1937). The government must utilize "sensitive tools," *Speiser v. Randall,* 357 U.S. 513, 525 (1958), when it seeks to limit such associational activity, even if the association chooses to incorporate, like the ACLU, as a nonprofit entity.

None of these principles was called into question by the decision in *McConnell*. To the contrary, *McConnell* was written within the framework of these principles. The Court began by recognizing a compelling state interest in prohibiting corporations and unions from utilizing general treasury funds to engage in partisan political activity. That recognition reaffirmed prior holdings, it did not depart from them. *See, e.g. Austin v. Michigan State Chamber of Commerce,* 494 U.S. 652 (1990). The majority then credited evidence in both the congressional and judicial record that corporations and unions were in fact engaging in partisan political activity by broadcasting so-called "sham" issue ads paid for with general treasury funds, and that pre-BCRA law was inadequate to deal with it. Finally, the Court concluded that the bright lines rules adopted in § 203 of the BCRA were a permissible response, in most cases, to the problem that Congress had identified.

Fairly read, the *McConnell* opinion did not go any further then, and this Court should not go any further now.

A. *McConnell* Did Not Resolve The Issue of Future As-Applied Challenges To § 203 of the BCRA

The plaintiffs in *McConnell,* including the ACLU, challenged the BCRA's ban on "electioneering communications" as facially unconstitutional. In the context of that facial challenge, both the evidence and this Court's opinion focused on whether the strict rules on corporate and union speech set forth in § 203 would impermissibly abridge a substantial amount of constitutionally protected speech, and thus violate the overbreadth doctrine. *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973). Neither the government nor the intervenors in *McConnell* ever questioned the fact that some ads barred by the literal language of § 203 were "genuine" issue ads rather than "sham" issue ads. That is, all parties in *McConnell* agreed, and the evidence indisputably showed, that § 203 barred

some ads that were never intended to influence the outcome of federal elections.

The dispute among the parties in *McConnell* was over how many ads fit into each category. The lowest estimate came from the Brennan Center, which was a strong proponent of the BCRA. A study it commissioned in anticipation of the litigation concluded that only 7% of corporate and union ads naming a federal candidate and broadcast during the blackout period in 1998 were "genuine" issue ads. *McConnell v. FEC*, 251 F. Supp. 2d 176, 309 (D.D.C. 2003). The methodology supporting this study was sharply contested, and other evidence in the record placed the figure significantly higher. *Id* at 309-312. Ultimately, this Court found it unnecessary to resolve the dispute because it concluded that plaintiffs had not satisfied the substantial overbreadth test. *McConnell*, 540 U.S. at 206 ("the vast majority of ads clearly had [an electioneering] purpose").

Even accepting the Brennan Center's figure, the question of how to handle those "genuine" issue ads that are nonetheless barred by the BCRA – including the ACLU's own broadcast ads – was simply not before the Court. To the extent that there is language in *McConnell* addressing that question, it is ambiguous and contradictory. Both the government and the district court place great weight on footnote 73, *id* at 190, where the *McConnell* majority announced that it was unnecessary to consider the backup definition of "electioneering communications" in § 201 of the BCRA because it was upholding "all applications of the primary definition." The government and the district court construe this language as a total bar to the sort of as-applied challenge that appellant has brought in this case, regardless of its merits. Footnote 73, however, does not compel that conclusion. Indeed, on its face, it does not even address the ban on corporate and union "electioneering communications" contained in § 203; rather, it addresses the

definition of "electioneering communications" set forth in § 201. Contrary to the view embraced by the government and the district court, it is equally plausible to read the language of footnote 73 in far a more limited way – namely, that the primary definition of "electioneering communications" applies whenever that phrase is used in the BCRA, including § 203. If that is the correct interpretation of footnote 73, it certainly does not follow that § 203's ban on "electioneering communications," including the nonpartisan speech of the ACLU, is likewise valid in "all applications."

Other language in *McConnell* is also inconsistent with the district court's refusal to entertain an as-applied challenge. In rejecting the argument that only "express advocacy" could be prohibited under the First Amendment, the *McConnell* majority wrote:

> This argument fails *to the extent* that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods *if* the ads are intended to influence the voters' decisions and have that effect.

McConnell, 540 U.S. at 206 (emphasis added). While this passage does not refer specifically to as-applied challenges, an as-applied challenge is the conventional means for testing, in a specific factual context, the Court's own proposition that the justifications for regulation of express advocacy *do not* apply to ads that *are not* intended to influence the voters' decisions and *do not* have that effect.

Similarly, the district court attached undue significance to the fact that the majority in *McConnell* expressly acknowledged the possibility of future as-applied challenges when discussing other provisions of the BCRA but not when

discussing § 203. Inferences from silence are always problematic, but they are especially problematic here given the conflicting message that can be drawn just as easily from the majority's silence in response to Justice Kennedy's assertion, in dissent, "that corporations and unions may bring as-applied challenges on a case-by-case basis." *McConnell*, 540 U.S. at 336. If the majority disagreed with that statement, it presumably would and could have said so explicitly.[5]

For decades, this Court has treated as-applied challenges as the constitutional safety net when facial challenges are denied. *E.g. Virginia v. Hicks*, 539 U.S. 113, 123 (2003). Absent a clearer statement than *McConnell* provides, it should not be assumed that this Court intended to depart from that well-settled doctrine. To the contrary, the Court has consistently rejected arguments suggesting that well-settled principles of constitutional jurisprudence have been overruled *sub silentio*. *See Gonzaga University v. Doe*, 536 U.S. 273, 300 n.8 (2002).

B. As-Applied Challenges Are Necessary To Ensure That The BCRA Does Not Abridge Constitutionally Protected Speech

There is no mystery about the purpose behind Section 203. As this Court recognized in *McConnell*, it was enacted to prevent corporations and unions from using general treasury funds for partisan political purposes by broadcasting so-called "sham" issue ads on radio and television in the critical period preceding a federal election. The defining

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[5] In response to Justice Kennedy's different point that § 203 should have been struck down as facially invalid because it reaches constitutionally protected speech, the *McConnell* majority rejected what it described as Justice Kennedy's "premise" that "sham" issue ads and "genuine" issue are entitled to the same protection. *McConnell*, 540 U.S. at 206, n.88. The function of an as-applied challenge is precisely to distinguish between the two, a distinction that the majority cited as central to its holding.

characteristic of a "sham" issue ad, described as an "electioneering communication" in the BCRA, is that it refers to "a clearly identified candidate" for federal office during the statutory blackout periods.

That definition is clearly content-based. In order to suppress a disfavored message of support or opposition for particular candidates, it limits the words that a speaker can use in its broadcast ads. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 295 (1984). Content-based restrictions on speech are subject to strict scrutiny and *McConnell* properly proceeded on that assumption. But its holding that the government had sufficiently established a compelling state interest to justify the BCRA's ban on "electioneering communications" must be understood in light of the facial challenge that the Court was considering. As the Court explained: "Even if we assumed that [the] BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not justify prohibiting *all* enforcement of the law . . ." *McConnell*, 540 U.S. at 207 (internal quotations and citation omitted)(emphasis added).

The opposite, however, is also true. The fact that § 203 of the BCRA is supported by a compelling state interest in the "vast majority" of cases, to use the Court's language in *McConnell,* does not mean that its enforcement in *all* cases is therefore constitutionally valid. If state-bestowed corporate advantages are not being used to engage in partisan political activity, then the ban on broadcast ads not only deprives speakers of their First Amendment rights without any constitutionally adequate justification, it deprives the public of information that can be useful in understanding the policy decisions facing government. Without that information, it is plainly more difficult for the public to participate intelligently in the process of democratic decisionmaking.

The First Amendment disfavors prophylactic rules, *see, e.g., Speiser v. Randall,* 357 U.S. 513 (1958), and statutes restricting free speech must be narrowly tailored both on their face and as applied. In *McConnell,* this Court held that the ratio of "sham" issue ads to "genuine" issue ads was sufficient to sustain § 203 against facial attack, but there is no constitutionally compelling justification to uphold the statute in circumstances where its asserted justifications do not apply.

Only two possible explanations have been offered for this anomalous result. The first explanation is that it is too difficult to distinguish between "genuine" issue ads and "sham" issue ads and thus the former must be sacrificed in order to ensure that the latter are prohibited. However, as the Court said in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 255 (2002), that notion turns the First Amendment "upside down." Constitutionally protected speech cannot be criminalized merely because it resembles constitutionally unprotected speech. *Id.* If that is true for sexually explicit speech, it certainly should be true for political speech that lies at the core of the First Amendment.

The second explanation is that § 203 imposes only a minor burden on speech because corporations and unions can speak through PAC's, and nonprofit corporations that qualify for *MCFL* status are not bound by the BCRA's ban on "electioneering communications."[6] There are several problems with this approach.

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[6] If anything, the decision in *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986), underscores the propriety of as-applied challenges in this sensitive First Amendment area. The Court in *MCFL* did not question the facial validity of the federal ban on the use of corporate funds for express advocacy. 2 U.S.C. § 441b. It nonetheless held that the general ban could not be applied to nonprofit corporations that satisfy three criteria: (1) they are formed to promote ideological goals; (2) they have no shareholders; and (3) they are not established by a for-profit corporation or union, and do not accept contributions from either.

Although a *de minimis* burden on speech will not trigger strict scrutiny, the government cannot avoid the rigors of strict scrutiny by characterizing § 203 as a regulation rather than a ban. "The distinction between laws burdening and laws banning speech is but a matter of degree. The government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000).

Furthermore, the existence of alternative avenues of communication is not normally enough to satisfy strict scrutiny. The adequacy of communication alternatives is a relevant factor when analyzing content-neutral laws. In a strict scrutiny context, however, the Court has long held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey Town of Irvington*, 308 U.S. 147, 151-52 (1939).

Shutting down an entire medium of communication triggers strict scrutiny in any event. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression."). It is no answer to say that the broadcast medium remains open to corporations or unions that are willing to alter their message because that was equally true in *Ladue*. There, the challenged ordinance allowed homeowners to display "for sale" signs on their property but prohibited them from displaying political signs. The Court properly viewed that discrepancy as enhancing rather than diminishing the constitutional violation. Here, it might be argued, the content-based discrimination is less stark because all that must be omitted from the proposed political broadcast is any reference by the speaker to a "clearly identified candidate." It is not a change of subject, just a change of script. Under the First Amendment, however, it is the speaker who gets to determine the political script and not

the government, absent a compelling justification. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 348 (1995).

In short, the government cannot escape the demands of strict scrutiny or the judicial inquiry it demands. As this Court explained in *McConnell*, "we must examine the degree to which [the] BCRA burdens First Amendment expression and evaluate whether a compelling interest justifies that burden." *McConnell*, 540 U.S. at 205.

For the ACLU, the burden is high and the compelling justification is non-existent for the very same reason. The ACLU is a nonpartisan organization. The government has no legitimate interest, let alone a compelling one, in regulating our nonpartisan political speech. *See ACLU v. Jennings*, 366 F. Supp. 1041 (D.D.C.1973) (holding that the ACLU could not be regulated as a "political committee" because it does not engage in speech designed to influence elections). And, the government has no right to jeopardize our nonpartisan reputation by forcing the ACLU to create a PAC that the public is likely to perceive as a symbol of partisanship, however we name it. Nor does the government have any right to demand that the ACLU adopt new fundraising strategies that the organization believes will operate to its detriment, simply to satisfy a law that has nothing to do with the manner in which the ACLU actually advocates on behalf of civil liberties.[7] This Court cannot and should not resolve those issues in this litigation. But the ACLU should not be foreclosed from raising them before an appropriate court in an as-applied challenge to § 203, if it chooses to do so.

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[7] This Court has, on occasion, minimized the regulatory burdens associated with PAC's, *see FEC v. Beaumont*, 539 U.S. 146, 163 (2003); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 201-02 (1982), but always in the context of contribution limits. *MCFL*, 479 U.S. at 259-60. Like *MCFL*, this case does not involve political contributions, it involves political speech.

Likewise, the *MCFL* exception has been so narrowly construed by the FEC that it is unavailable to many non-profits, including the ACLU, that do not present any of the dangers of corporate speech articulated in *Austin, supra,* and relied on by Congress in crafting § 203 of the BCRA.[8] The First Amendment rights of the ACLU ought not to be sacrificed based on categorical assumptions about the burdens imposed by § 203 that might well be disproved in an as-applied challenge.

That is especially so because the *MCFL* criteria were developed for nonprofit organizations that want to engage in "express advocacy" by taking positions in partisan political races. This Court's embrace of the *MCFL* option in *McConnell* rested on the premise that "electioneering communications" were the functional equivalent of "express advocacy." When that premise does not apply, as it does not for "genuine" issue ads, the *MCFL* analogy becomes less relevant in assessing the burden on organizations like the ACLU.

C. An As-Applied Challenge To § 203 Could Be Framed In A Variety Of Ways

Appellant has presented this Court with a traditional as-applied challenge. It concedes that the ads at issue fall within the literal language of § 203 but argues that the statute unconstitutionally limits its speech in this instance because the ads in fact are "genuine" issue ads rather than "sham"

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[8] Under existing law in the District of Columbia Circuit, *see FEC v. National Rifle Association of America,* 254 F.3d 173 (D.C.Cir. 2001), and governing FEC regulations, 11 CFR § 114.10, the ACLU appears not to qualify for an *MCFL* exemption because it has not returned the exceedingly modest funds that have been contributed to the organization in recent years from sources other than individuals. Regulating the ACLU to relinquish these minimum funds without justification converts the *MCFL* criteria into an unconstitutional tax on speech. *See Murdock v. Pennsylvania,* 319 U.S. 105 (1943); *Grosjean v. American Press Co.,* 297 U.S. 233 (1936)

issue ads, and were intended to influence policy decisions rather than electoral outcomes. If this Court agrees, appellant is entitled to a remand or an outright reversal. To affirm under these circumstances would be to sanction the suppression of constitutionally protected speech without any compelling justification. This Court should not endorse a result that so plainly offends the First Amendment.

We suspect, although we do not know, that one explanation for the district court's opinion was a reluctance to be placed in the position of reviewing the numerous as-applied challenges to § 203 that it could probably anticipate. That concern is understandable, and it applies to litigants as well as the judiciary. The time and expense of judicial proceedings is a problem for everyone. In particular, smaller nonprofits that are least likely to engage in electoral advocacy are also least likely to be able to afford the cost of seeking declaratory and injunctive relief, especially on an emergency basis. Having to seek judicial approval prior to speaking is not a solution that anyone favors, but it is preferable to the total denial of any opportunity to challenge the government's regulation of speech in a particular factual setting.[9]

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[9] In response to a Notice of Proposed Rulemaking from the FEC, the BCRA's sponsors submitted comments that set forth their version of what speech could be allowed notwithstanding the categorical ban on "electioneering communications" in § 203. Even the sponsors would allow broadcast ads that (1) only concern a legislative or executive branch matter; (2) only refer to a clearly identified candidate as part of a statement urging the public to contact their representative about the pending matter; (3) only refer to the candidate by title – *e.g.*, "your congressman" or "your senator." But to qualify for this exception, the broadcast ads could not mention party affiliation, contain the name of likeness of the federal official, or mention the candidate's position on any issue, including the issue that is the subject of the ad. *See* Letter from Senator McCain, et al. to the FEC (dated August 23, 2002), available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf (last visited on November 5, 2005).

If speakers are denied the opportunity to bring an as-applied challenge, they can always speak at their peril and then raise a First Amendment defense to any enforcement proceeding. Under those circumstances, however, many organizations will choose not to speak. The FEC could dissipate that chilling effect by clarifying its enforcement policy. But, in the absence of clarification, this Court has routinely allowed pre-enforcement challenges to discourage self-censorship and preserve First Amendment rights. *E.g. Steffel v. Thompson,* 415 U.S. 452, 459 (1974). It should do so here, as well.

An as-applied challenge that focused on the speaker rather than the speech is another alternative. In all likelihood, it would reduce the number of potential challenges and perhaps lead to more predictable results. That is the approach this Court followed in *MCFL,* and it is also the approach this Court followed in *Brown v. Socialist*

It is hard to believe that the ACLU's First Amendment right to speak can or should hinge on whether its broadcast ad says "Contact your Senator" or "Contact Senator McCain." Similarly, it is hard to believe that the First Amendment permits the government to tell the ACLU that it can broadcast an ad saying "Ask your congressman to vote against the Flag Amendment," but that the ACLU is subject to criminal prosecution if its ad copy says "Ask you congressman to switch his vote from yes to no on the Flag Amendment."

For present purposes, however, it is sufficient to note that the government can have no possible justification for barring ads that even the BCRA's sponsors admit would not imperil the underlying purposes of § 203. On the other hand, it is unfair to ask potential speakers to rely on a three year old letter from members of Congress who are not ultimately responsible for enforcing the BCRA's provisions. Given *McConnell,* the only way to resolve this conundrum is through an as-applied challenge.

Workers '74 Campaign Committee (Ohio), 459 U.S. 87 (1982)(recognizing an organizational exception to campaign disclosure rule based on a reasonable fear of retaliation). The ACLU, as noted previously, has never endorsed a candidate for elective office in its 85-year history. It should not have to go to court merely to continue doing what it has always done – namely, engage the public in a discussion about civil liberties, whether that discussion is provoked by events occurring before, during, or after an election. However, if the ACLU does go to court with an as-applied challenge to obtain the protection of a judicial order its history should entitle it to a presumption that its broadcast ads are "genuine" issue ads and thus not subject to § 203. Conversely, if the government initiates its own enforcement proceeding, it should have to shoulder the burden of proving that the ACLU has suddenly departed from its long and consistent nonpartisan past.

Finally, this Court can and should take the opportunity to reconsider its holding on the Snowe-Jeffords Amendment. The Snowe-Jeffords Amendment was adopted as § 203(b) of the BCRA. Contrary to the seemingly absolute language of § 203(a), it permitted nonprofit corporations organized under § 501(c)(4) of the Internal Revenue Code, like the ACLU, to engage in "electioneering communications" if those communications were funded by individuals and governed by certain disclosure rules. Section 204 of the BCRA, known as the Wellstone Amendment, then negated what the Snowe-Jeffords Amendment had seemingly allowed by reinstating the prohibitions of § 203(a) for § 501(c)(4) corporations.

In *McConnell,* this Court ruled that the Wellstone Amendment was controlling as a matter of legislative intent, subject to the judicially-imposed caveat that it could not apply to *MCFL* corporations. That decision may well have been correct as a matter of legislative construction. But, as a matter of First Amendment law, the Snowe-Jeffords

Amendment provides a more narrowly tailored response to the asserted congressional interests by leaving IRS in charge, as it has always been, of policing the line between permissible and impermissible partisan activity by nonprofit entities. Congress got it right when it first drafted the Snowe-Jeffords Amendment and the Court is now in a position to say so. As applied to § 501(c)(4) nonprofit corporations, the BCRA's ban on "electioneering communications" goes farther than it needs to go.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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IN THE

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WISCONSIN RIGHT TO LIFE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF ALLIANCE FOR JUSTICE, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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BRIEF OF ALLIANCE FOR JUSTICE, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS*

Amicus Alliance for Justice is a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations.[1] These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to the public policymaking process. Alliance for Justice and most of its members are charitable organizations that are exempt from federal income tax under

[1] Counsel for each party has consented to the filing of this brief. No counsel for a party authored this brief, in whole or in part. No person or entity other than *Amicus* made a monetary contribution to the preparation or submission of this brief.

Section 501(c)(3) of the Internal Revenue Code ("IRC"). A significant number of these members also work with or are affiliated with other types of nonprofit organizations that promote their views not only through public education and advocacy on public policy issues but also in the electoral process.

On matters of public policy, Alliance for Justice consistently takes positions that sharply contrast with Appellant in this case, and Alliance for Justice has itself produced broadcast advertisements supporting the important role of the Senate in considering the President's nominees to the federal bench. Despite differences on public policy issues, Alliance for Justice shares with Appellant the position that each organization has a First Amendment right to vigorously put its views on public policy matters before the public.

That belief in the intrinsic value of unfettered public debate in the public policy arena is central to Alliance for Justice's mission. Alliance for Justice works to increase the involvement of all types of tax-exempt organizations in the policy-making process by helping them understand and comply with sometimes complex federal tax and election laws governing these activities. Alliance for Justice supports nonprofit advocacy through plain language guides to the laws governing nonprofit advocacy, workshops for nonprofit organizations, and individualized technical assistance. Alliance for Justice also monitors legislative and regulatory activity, providing information to the nonprofit community and lobbying on proposed policy issues related to nonprofit advocacy.

During the congressional debate on the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81 ("BCRA"), Alliance for Justice expressed its concerns to BCRA's congressional sponsors and other members of Congress that the law's broadly drafted restrictions on "electioneering communications," BCRA § 203, 2 U.S.C. § 441b(b)(2),

would sweep in constitutionally protected speech.[2] However, Alliance for Justice did not seek to participate in the facial challenge to these provisions of BCRA, *McConnell v. FEC*, 540 U.S. 93 (2003), in part because the communications Alliance for Justice sought to protect were not squarely before the Court. Alliance for Justice submits this brief because the Court is now presented with speech that BCRA may not regulate consistent with the First Amendment because there is no compelling governmental interest that justifies the regulation. *Amicus* urges the Court to rule that such speech may not be restricted under the Constitution and to set out clear standards to protect the speech of independent organizations.

SUMMARY OF ARGUMENT

Under the strict scrutiny with which this Court examines restrictions on speech, this Court may only uphold a law as applied to particular communications to the degree that the government can demonstrate the restriction is necessary to achieve a compelling governmental interest. This Court has found that the threat of corruption to the political process justifies such restrictions as applied to some speakers and some communications, but the Court has also exercised its authority to construe narrowly statutes to protect speakers or speech that does not pose that risk.

In examining the broadcast communications that might fall within BCRA's technical definitions of electioneering communications and are similar to the ads challenged in this case,

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[2] Specifically, this section of BCRA prohibited corporations or unions from using general treasury funds to pay for "electioneering communications," which were defined at Section 201 as certain broadcast communications identifying a candidate for federal office aired within 30 days of a primary election or nominating convention or 60 days of a general election. BCRA § 201, 2 U.S.C. § 434(f)(3). *Amicus* does not challenge as unconstitutional the application of the disclosure provisions imposed on electioneering communications at Section 201. BCRA § 201, 2 U.S.C. § 434(1)-(2).

it is clear that many organizations apparently subject to the law's limits on electioneering communications have a legitimate First Amendment desire and need to air those communications. However there is no showing that the government's compelling interest in preventing corruption justifies the application of BCRA's restrictions to those communications.

Amicus offers and discusses three independent classes of broadcast communications that BCRA may not constitutionally regulate because there is no compelling governmental interest to justify such regulation:

- BCRA's restrictions on broadcast communications may not be applied to broadcast communications funded solely by individuals and aired by organizations not formed primarily for commercial or economic purposes because the government may not constitutionally restrict individual expressive expenditures and the nature of the organizations demonstrates that the use of these funds accords with its donor's views.
- BCRA's restrictions on broadcast communications may not be applied to communications aired by organizations exempt from federal income tax under IRC Section 501(c)(3) because these organizations do not engage in the types of activities that might justify governmental restrictions on speech.
- BCRA's restrictions on broadcast communications may not be applied to communications funded solely by individuals and concerning a specific legislative or administrative policy proposal because of the special constitutional protections afforded both individual expression and speech concerning matters of public policy.

The narrow test proposed by Appellant, although sufficient to provide Appellant with relief, fails to adequately protect these types of broadcast communications. Instead, *Amicus*

respectfully urges the Court to provide a ruling that clearly permits protected speech that might otherwise be chilled and thus reduces the necessity for future as-applied challenges.

ARGUMENT

I. Election Laws That Restrict Speech Are Permitted Only To The Degree That The Threat Of Corruption To The Political Process Is Found To Be A Compelling Governmental Interest As Applied To The Communications In Question.

In considering attempts by the government to restrict speech through federal election laws, this Court exercises strict scrutiny, and any restrictions must be necessary to achieve a compelling governmental interest. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *NAACP v. Button*, 371 U.S. 415, 438 (1963). Although the Court has found that some election laws survive strict scrutiny under the First Amendment, the Court has limited statutes that would have restricted speech that does not threaten to corrupt the political process.

A. The Court had said that the threat of corruption of the political process justifies some restrictions on electoral speech by some corporations and unions.

This Court has focused on the risk of corruption of the political process as the justification for campaign finance laws restricting speech.

In *Buckley*, this Court upheld the statute's limit on political contributions based on the compelling interest of the need to "limit the actuality and appearance of corruption." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). The Court used the corruption rationale to uphold the statute's restrictions on campaign contributions but found that rationale insufficient to uphold the statute's expenditure limits where there was less "danger

that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S at 26-29; 39-52 (1976).[3]

In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court described its rationale for holding that restrictions on corporate political spending were generally justified by the possibility of corruption through the legal advantages that permit business corporations to amass funds. Such restrictions were permitted, it stated, because of the need:

> to restrict "the influence of political war chests funneled through the corporate form"; to "eliminate the effect of aggregated wealth on federal elections"; to curb the political influence of "those who exercise control over large aggregations of capital"; and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization."

It further noted that:

> Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of

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[3] Justice Stevens has been less persuaded by the Court's distinction between contributions and expenditures, finding that the danger of *quid pro quo* exists in both circumstances. See, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring). Justice Stevens would, however, draw the line between restricting lobbying on matters of public policy and attempts to influence elections for public office. *Id.* Under this approach as well, Appellant's communications should be spared from BCRA's electioneering communications restrictions, as discussed *infra* in Section V of this brief.

> a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

479 U.S. at 257-58 (citations omitted).

In upholding BCRA's electioneering restrictions against a facial challenge, the Court in *McConnell* relied on this same concern for avoiding corruption of the system. The *McConnell* Court cited its previous election-law decisions to uphold the "legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *McConnell*, 540 U.S. 93, 205 (quoting *Austin*, 494 U.S. at 660). [4]

B. This court has narrowly construed or partially invalidated statutes that are overbroad for their failure to demonstrate a compelling governmental interest in regulating constitutionally protected speech.

As reflected above, the Court's most extensive discussion of the threat that amassed corporate wealth poses to the political system was in its decision in *MCFL*. Yet *MCFL* ultimately found that the Constitution required the Court to limit the reach of the statute in question because it was overbroad as applied to Massachusetts Citizens for Life. Because of the nature of the organization, there was no threat that wealth amassed for commercial purposes would be

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[4] Even Appellee FEC acknowledges "the statute's anti-corruption purposes" and the "federal interest in preventing actual or apparent electoral corruption." Motion to Dismiss at 16, 18.

perverted to skew the political system. The Court was explicit:

> Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic market-place, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise. In short, MCFL is not the type of "traditional corporatio[n] organized for economic gain" that has been the focus of regulation of corporate political activity. *MCFL*, 479 U.S. at 259 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985)).

For these reasons, the Court in *MCFL* exercised its judicial authority to create "a limiting construction or partial invalidation [to narrow the law and] remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Similarly, in *McConnell*, the Court limited the construction of BCRA's electioneering communications restrictions by exempting "*MCFL* organizations." *McConnell*, 540 U.S. at 211.[5]

As a result, the BCRA limitations on the broadcast communications featuring federal candidates that are at issue in this case can only survive if the government can show that these restrictions are necessary to prevent corruption of the political system.

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[5] This is not the only evidence that *McConnell* did not foreclose as-applied challenges to BCRA. Alliance for Justice concurs with Appellant's arguments that such as-applied challenges to BCRA are permitted and constitutionally necessary. Alliance for Justice understands that future as-applied challenges will arise, and *Amicus* encourages this Court to define other areas of constitutionally protected speech as organizations with concerns different than those of Appellant seek relief.

II. The Breadth Of BCRA's Definition Of Electioneering Communications Could Either Chill Or Lead To Future Legal Challenges In Support Of A Variety Of Broadcast Communications.

Appellant's challenge asks the degree to which Congress may constitutionally forbid corporations and unions from using their funds to broadcast at certain times messages featuring individuals who are federal candidates. This issue potentially arises in countless broadcast communications made by groups across the political spectrum to contribute to the public debate on social and policy issues. Absent a ruling from this Court setting forth the Constitutional parameters of acceptable regulation of these communications, numerous organizations will be faced with the choice of mounting their own as-applied challenges to BCRA or of foregoing protected speech because of the burdensome expense involved in bringing such challenges.

A. Representative examples of potential electioneering communications abound.

As set forth below, a variety of organizations have produced numerous examples of broadcast communications in which federal elected officials have been identified in some manner. None of these broadcasts violated BCRA's restrictions on electioneering communications because they appear to have aired either prior to the effective date of BCRA or outside of BCRA's blackout period for electioneering communications.[6] Each of these examples is an illustration of a broadcast communication that is not one of the so-called "sham issue ads" that BCRA sought to regulate, but BCRA

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[6] It has not been possible for *Amicus* to determine when or even whether every one of these broadcast messages actually aired, particularly the public service announcement ("PSAs") (see discussion below), although *Amicus* has no reason to doubt that most of them were broadcast and that they aired outside of BCRA-restricted blackout periods.

would nonetheless prohibit a corporation or union from running the communications during a blackout period.

Lobbying and Similar Public Policy Advocacy

- In 2002, Senator John McCain of Arizona, a chief sponsor of BCRA at the federal level, appeared in television advertisements produced by Arizona's Clean Elections Institute, a 501(c)(3) organization supporting Arizona's public financing system for state elections. *See* http://www.azclean.org/documents/PR-McCainPSA.pdf (press release describing the ad) (last visited November 8, 2005).[7] Arizona's public financing system had been adopted through a state referendum in 1998, and the McCain ads were designed to encourage Arizonans to support the program with voluntary contributions. Senator McCain was not up for reelection in 2002; however, he was facing the voters in 2004 when opponents of the Arizona public financing system tried to put a measure repealing the system on the ballot. A court decision prevented the measure from appearing on the ballot, *Clean Elections Institute, Inc. v. Brewer*, 99 P.3d 570 (Ariz. 2004), making unnecessary possible advertisements by Senator McCain in further support of the public financing system during the electioneering communications blackout period.
- In 2005, the organizations Focus on the Family Action and FRC Action (I.R.C. Section 501(c)(4) affiliates of the 501(c)(3) organizations Focus on the Family and the Family Research Council) ran radio advertisements in states represented by more than

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[7] For the convenience of the Court and the parties, *Amicus* has created and will maintain a web page offering hyperlinks to all URLs referenced in this brief at www.harmoncurran.com/WIRTL. An electronic copy of this brief will also be available on this website. Only information that has been filed with this Court and served on the parties to this case will appear on this page.

twenty moderate Republican and Democratic senators in an effort to stop the use of the filibuster as part of the Senate's consideration of a handful of nominees to the federal bench. *See* http://www.focusaction.org/activities/a0000069.cfm (describing and providing links to the radio ads as well as a coordinated print ad campaign) (last visited November 8, 2005). The Senators named in the ads were perceived by organizations on both sides of the issue as key votes in determining whether an effort to end such filibusters would succeed.

- In the spring of 2005, Alliance for Justice Action Campaign (the 501(c)(4) affiliate of *Amicus*) aired a television advertisement featuring Senator Harry Reid of Nevada decrying stated plans by some Senators to change Senate rules and prevent filibusters during consideration of judicial nominees.

- In 2005, as the House of Representatives considered legislation to permit drilling for oil in the Arctic Wildlife Refuge, Defenders of Wildlife, the Alaska Coalition of New Jersey, and the New Jersey Chapter of the Sierra Club ran television ads that were capable of being received by more than 50,000 people in the districts of each of the five specific members of Congress from New Jersey. [8] *See* http://www.save

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[8] BCRA's definition of electioneering communications requires that they be "targeted to the relevant electorate" which means, in turn, that they are capable of being "received by 50,000 or more persons" in the district or state the candidate seeks to represent. BCRA § 201, 2 U.S.C. § 434(f)(3)(C). There is no way to be certain whether all of the examples featured in this brief met this requirement. However, organizations producing such ads will almost certainly choose to distribute them where the spokesperson has greater recognition among viewers or listeners. Similarly, individual broadcasters deciding whether to air such ads may likewise be more motivated to run ads featuring the local member of Congress. Thus, it is likely that advertisements produced for a national audience will be heard or viewed by the requisite 50,000 people in the jurisdiction represented by the officeholder.

arcticrefuge.org/ads.html (links to the ads and coordinated print ads) (last visited November 8, 2005). The members of Congress featured were perceived as likely swing votes on the issue.

- Congressman Barney Frank of Massachusetts recorded a broadcast advertisement for the 501(c)(3) Family Pride Coalition in the Spring of 2005 that criticized U.S. Department of Education Secretary Margaret Spellings for threatening to cut funding for a PBS children's television show that featured the child of a lesbian couple. *See* http://www.familypride.org/site/apps/nl/content2.asp?c=bhKPI7PFImE&b=551485&ct=704195 (press release describing the ad) (last visited November 8, 2005).

Public Service Announcements

- Immediately after the attacks of September 11, 2001, Senator John McCain of Arizona recorded a PSA for the Arab American Institute (a 501(c)(4) organization) to encourage all Americans not to discriminate against Arab and Muslim Americans in response to the attacks. *See* http://www.aaiusa.org/PDF/Fall_01.pdf at 2 (newsletter article about the PSAs) and http://www.adcouncil.org/about/news_100101 (press release about the PSAs) (last visited November 8, 2005).

- Congressman Tim Bishop of New York recorded a PSA for the American Cancer Society (a 501(c)(3) organization) highlighting October as Breast Cancer Awareness Month. *See* http://wwwc.house.gov/timbishop/issues1.htm (Congressman Bishop's website featuring a link to the ad under the entry for October 27, 2005) (last visited November 10, 2005). Although it appears that the PSA was recorded to air in 2005, the ad is not scripted for a particular year and could well be aired in Congressman Bishop's district during October of 2006, a month before the 2006 congressional elections.

- Congressman Christopher Cox of California appeared in a PSA for the Alzheimer' Association of Orange County (a 501(c)(3) organization). *See* http://www.alzoc.org/home.asp?seltopic1=10&selcategory1=64 (Congressman Cox's website featuring a link to the ad) (last visited November 8, 2005).
- Senator Harry Reid of Nevada recorded a PSA for the National Campaign to Prevent Teen Pregnancy (a 501(c)(3) organization) to promote May 2002 as National Teen Pregnancy Prevention Month. *See* http://www.teenpregnancy.org/resources/reading/audiovisual.asp (Campaign website featuring link to Reid ad in listings for 2002) (last visited November 8, 2005).

Fundraising Efforts

- In 2004, the National Kidney Foundation (a 501(c)(3) organization) aired radio ads featuring Congressman Tom Davis promoting a charity golf tournament to raise funds for the Foundation. Congressman Davis sought and received an advisory opinion from the FEC permitting him to appear in these ads. FEC Advisory Op. 2004-14. The FEC relied on a regulation exempting unpaid advertising from the definition of "electioneering communications," a regulation that was subsequently struck down in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). The FEC opinion had noted that ad would also have been exempt because it ran a week outside of the statutory time window.

B. It is likely that organizations will desire or seek to air similar broadcast advertisements during the electioneering communications blackout periods.

There is compelling evidence that organizations, including Appellant in this case, would wish and need to broadcast communications on matters of public or social policy that

identify a federal candidate, such as those in the examples above, within the statutory 30- and 60-day timeframes provided under BCRA.

It is particularly likely that broadcast communications for purposes of lobbying on legislative and administrative actions must air during the blackout periods in order to be effective. The blackout periods are frequently periods of intense legislative activity. Between September 4 and Election Day, 2004, over 100 roll call votes were taken in the United States House of Representatives. *See* http://clerk.house.gov/evs/2004/ROLL_500.asp (last visited November 7, 2005). The Senate took nearly 50 roll call votes. *See* http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm (last visited November 7, 2005). All of these votes were taken during the 60-day period prior to the election when electioneering communications were prohibited. The issues addressed in the legislation, including welfare reform, a constitutional amendment on marriage, tort reform, and Department of Defense and other agency appropriations, profoundly affect domestic public policy. At the critical point of passage, BCRA deprives organizations of an essential tool—broadcast media to urge members of the public to contact particular wavering legislators.[9]

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[9] The disproportionate legislative activity that occurs during the blackout periods imposed by BCRA is also evident from the numbers of bills enacted into law by the United States House of Representatives and Senate during election and non-election years: 300 in 2004 versus 198 in 2003; 241 in 2002 versus 136 in 2001. 149 Cong. Rec. D456 (daily ed. May 6, 2003) (Résumé of Congressional Activity—First Session of the One Hundred Seventh Congress); 149 Cong. Rec. D457 (daily ed. May 6, 2003) (Résumé of Congressional Activity—Second Session of the One Hundred Seventh Congress); 151 Cong. Rec. D96 (daily ed. February 15, 2005) (Résumé of Congressional Activity—First Session of the One Hundred Eighth Congress; 151 Cong. Rec. D97 (daily ed. February 15, 2005) (Résumé of Congressional Activity—Second Session of the One Hundred Eighth Congress).

In the context of PSAs, the decision of when to air the PSA—and avoid a BCRA violation—may not even be in the hands of the organizations producing the ads: PSAs are usually produced and distributed by charitable and other organizations, but when they are aired is typically at the discretion of individual broadcasters. Many PSAs have no set "shelf life," and could be broadcast many months or years after they are distributed, without the control or even knowledge of the nonprofit that created and disseminated the ad. *See, e.g.*, Comments of the American Cancer Society to the FEC on the Proposed Rules Regarding Electioneering Communications (Notice 2005-20) (September 30, 2005) at 2, *at* http://www.fec.gov/pdf/nprm/electioneering_comm/comments/comm_9.pdf ("ACS creates a PSA, and sends it to media outlets. *ACS does not retain control over whether and if a PSA is then used or discarded.*" (emphasis in original)).

Thus, as noted above, the American Cancer Society PSA recorded by Congressman Tim Bishop highlighting October as National Breast Cancer month could very well air in October 2006 as Congressman Bishop again goes before the voters. If so, the ad would violate BCRA's mechanical definition of electioneering communications. Without resolution of the constitutional issues presented in this case, the American Cancer Society and other nonprofit organizations may be well advised to forego constitutionality protected speech by no longer asking federal officeholders to appear in PSAs.[10]

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[10] Even ceasing to use federal officeholders in PSAs does not completely eliminate the risk of a BCRA violation. As prominent people from other spheres of life enter politics, an organization could run a risk asking celebrities or community leaders who are not currently officeholders to appear in their PSAs lest these individuals later decide to seek federal office. The American Cancer Society comments discuss a print advertisement in which then First Lady Hillary Clinton appeared urging individuals to get colorectal cancer screening, an advertisement that was then unearthed and reprinted by the *New York Post* during Mrs. Clinton's cam-

Absent relief from this Court, the likelihood is that most organizations will simply decide not to produce or air these broadcast communications during the blackout periods, despite the desire and need to do so. Few organizations are like Appellant in having both the doggedness and the resources necessary to sustain an as-applied challenge to the statute. Some will, but prudence would urge other groups to remain silent. Their speech would be effectively cut off and their ability to make broadcast communications restricted by BCRA's blunt tool.[11]

Both to prevent this possible chilling of protected speech and to avoid burdening the courts with unnecessary as-applied challenges, *Amicus* urges the Court in this case to hold that BCRA's definition of electioneering communications is unconstitutionally overbroad as applied to communications such as those presented by Appellant and those in the examples presented here. Resolution of the issues raised by the as-applied challenge in this case will provide guidance to organizations communicating in the public arena about the scope of their constitutionally protected speech

III. BCRA's Restrictions On Broadcast Communications Are Unconstitutional As Applied To Communications Funded Solely By Individuals And Aired By Organizations Not Formed Primarily For Commercial Or Economic Purposes.

Appellant has indicated that it is a "nonprofit, nonstock, ideological" corporation, and it indicates that it was willing to

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paign for the U.S. Senate. The same issue could easily arise in the context of the broadcast communications that BCRA regulates.

[11] Appellee will argue that the restrictions on electioneering communications are not a ban but rather a requirement that such communications not be made with funds from corporations or unions. The burdens discussed in more detail below make this an effective ban on such speech by many organizations.

run the ads in question here "with money from a 'segregated bank account' [containing] only donations from qualified individuals." Jurisdictional Statement at 6. The law's compelling governmental interest in preventing the corruption or possibility of corruption created by the amassed power of corporate wealth cannot be linked to a prohibition on electioneering communications to such an organization airing broadcasts using only such funds. Accordingly, this Court should find that BCRA's restrictions on electioneering communications are unconstitutionally broad as applied to these communications.

A. Using individual funds prevents corporate corruption.

Historically, the rights of individuals have been favored over the rights of corporations and unions because the Court has held that individual expenditures pose less risk of corrupting the political system. For example, in *Buckley*, the Court found that Congress may not constitutionally limit independent expenditures by individuals, even for communications that constitute "express advocacy" for or against a candidate. 424 U.S. at 45-51. The Court found a strong constitutional interest in protecting such speech and held that it did not create a sufficient threat of corruption to justify the attempted statutory restriction.

It is not clear why this preference for electoral spending by individuals should be any less powerful in groups of individuals. Yet, extending BCRA's restriction on electioneering communications to accounts comprised of funds solely from individuals would prohibit a group of individuals from joining together to say what one wealthy individual could say alone.

Furthermore, the restrictions on aggregating individual funds through corporations and unions, as opposed to other forms, seems a victory of form over substance. BCRA per-

mits a partnership, a trust, or other unincorporated entity to use funds derived solely from individuals to pay for electioneering communications. *See* BCRA § 203, 2 U.S.C. § 441b.

If, as discussed below, the Court believes that the political expenditures of corporations and unions pose a greater threat of corruption to the political system than those of individuals, then requiring that the funds used to pay for electioneering communications derive from individuals will address this concern. *Amicus* is not suggesting that the organization eschew all corporate and union funds but only that it pay for electioneering communications from a segregated account comprised solely of funds from individuals. No corporation (even a non-commercial organization such as Appellant) would be able to act as a conduit to spend otherwise prohibited corporate or union funds for electioneering communications. *See MCFL*, 479 U.S. at 262 (noting this issue and ruling that disclosure requirements were sufficient to address it; here Appellant offers to meet a higher standard of protection).

B. Corporate money's power to corrupt the political process is largely absent when the corporation is not formed for commercial or economic purposes.

Not all corporations are the same in their potential to skew the political process through the exercise of corporate wealth amassed for business purposes. As noted above, the Court distinguished Massachusetts Citizens for Life because it "was formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259. In *MCFL*, the Court noted that "[i]ndividuals who contribute to [an organization such as Massachusetts Citizens for Life] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *Id.* at 260-61. The Court rejected outright the idea that the concerns that justified

restrictions on other corporate speech were at all present for such an organization:

> It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form. *Id.* at 263.

This same rationale applies to any organization not formed primarily for commercial or economic purposes. The individuals providing the organization with funds are not misled about the organization's purposes. The donor to the voluntary, nonprofit organization gives with a full understanding of and support for the organization's mission.[12]

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[12] *Amicus* notes that there may be a similar distinction to be drawn between the unions and for-profit corporations. In its consideration of the constitutionality of election laws, this Court has followed the statutory scheme set forth by Congress in treating unions and business corporations in a similar manner. However Congress may have made that choice based on politics rather than constitutional imperatives, seeking passage of legislation by balancing the competing interests of management and labor. Seen through the constitutional lens, there are cognizable differences between business corporations and unions that justify greater protection for union political activity. In many respects, unions are more like the voluntary associations discussed in *MCFL* than they are like business corporations. As this Court noted in *Austin*:

> [L]abor unions differ from corporations in that union members who disagree with a union's political activities need not give up full membership in the organization to avoid supporting its political activities. Although a union and an employer may require that all bargaining unit employees become union members, a union may not compel those employees to support financially "union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive representative of the bargaining unit on labor-management issues. As a result, the

Despite the Court's guidance that voluntary nonprofit organizations are due more constitutional deference, Appellee asserts that the bright-line nature of the electioneering communications definition is a sufficient purpose standing alone to uphold the statute against all as-applied challenges, even in the absence of any possibility for systemic corruption. Motion to Dismiss at 17. However, this Court in *MCFL* instructed the FEC that when "the rationale for restricting core political speech . . . is simply the desire for a bright-line rule[, it] hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263. The FEC's already rejected argument falls especially flat when, as here, equally bright-line tests that are not unconstitutionally overbroad are available.

C. Requiring Appellant to create a new form of entity is overly burdensome and thus not "necessary" even if a compelling governmental interest could be identified.

Appellee has argued that Appellant could create a political committee in order to air communications such as those at issue in this case, and Appellee will no doubt also argue that Appellant is free to become or create an *MCFL* organization to broadcast these messages. As the discussion above shows, because the government cannot show a threat of corruption for non-commercial/non-economic organizations that use funds derived from individuals, there is no constitutional basis for the government to restrict speech in this way. In addition, the requirement is more burdensome than necessary to achieve any compelling governmental interest that may exist.

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funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury. *Austin*, 494 U.S. at 665-66 (citations omitted).

The burdens of creating a federal political committee are significant. Chief among these is the contribution limit of $5,000 per donor, an amount that has remained unchanged since it was first imposed in 1976, resulting in a substantial reduction in the real buying power of those funds due to inflation. In addition, there are the detailed recordkeeping and reporting requirements acknowledged by this Court as burdensome in *MCFL*. *MCFL*, 479 U.S. at 253-56.[13] Finally there are some organizations that perceive political committees as somehow too much a part of the "sordid" political process, and many organizations would rather forego the opportunity to air broadcast advertisements rather than create an affiliated political committee.

Unlike requiring a 501(c)(3) organization to form a 501(c)(4) lobbying affiliate, as suggested in the Court's holding in *Regan v. Taxation with Representation of Washington*, establishing a federal political committee presents a considerable burden. 461 U.S. 540 (1983). The court emphasized in *Regan* that a 501(c)(3) organization was not denied the right to engage in lobbying activities because establishing a 501(c)(4) affiliate "requires *only* that the two groups are separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." *Id.* at 544 n. 6 (emphasis added). A corporation, whether organized under I.R.C. Section 501(c)(3) or 501(c)(4), requires substantially the same recordkeeping and reporting, and the Court did not find that dual structure overly burdensome. However, the process of registering and operating in compliance with registration, recordkeeping and reporting requirements of the Federal Election Campaign Act is vastly more complicated. Making this burden a requirement for

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[13] The district court in this case suggested that Appellant could create a political committee despite the explicit warning from this Court in MCFL against requiring the creation of a political committee to engage in constitutionally protected speech. Mem. Op. 7.

running broadcast lobbying communications presents an undue hardship.

Indeed some organizations—those operating under Section 501(c)(3) of the tax code—may be reluctant to create an affiliated political committee to avoid a perceived risk to the organization's tax-exempt status. Many 501(c)(3)s may be justifiably concerned that creating a political committee registered with the FEC suggests impermissible campaign intervention that would jeopardize their tax-exempt status.

Amicus takes the position that it would be permissible under the federal tax code, for a 501(c)(3) public charity to create a political committee if that committee was used solely for 501(c)(3)-permissible purposes, such as airing the broadcast ads featuring federal candidates described above. Even if they were willing to undertake the burdens discussed above, however, many 501(c)(3)s would likely choose to avoid the perceived risk of this uncharted legal territory and not create a political committee. If a political committee is the vehicle required to air these broadcast ads, most 501(c)(3)s would simply not air them.

The burdens of operating as an *MCFL* organization are likewise significant. In the wake of this Court's ruling in *MCFL*, Appellee FEC promulgated a regulation, 11 C.F.R. § 114.10, that sets out the standards the FEC will apply in determining whether an organization qualifies as a so-called "qualified nonprofit corporation."[14] The regulation requires

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[14] Alliance for Justice notes that the FEC's requirements under Section 114.10 are more restrictive than this Court's ruling in *MCFL* and subsequent cases in significant ways. For example, the regulation requires that the organization qualify as exempt from federal income tax under IRC Section 501(c)(4), a requirement nowhere stated in *MCFL*; and the regulation forbids the "qualified nonprofit" from receiving even an insignificant amount of funding from a business corporation, a position rejected by all of the Circuit Courts that have addressed the issue. James Bopp, Jr. & Richard E. Coleson, *The First Amendment is Still Not a Loophole: Exam-*

that the organization refrain from even incidental business activities, such as sales of advertising in publications or licensing the use of its name. The organization must not offer its members any benefits such as insurance or group purchasing programs that might serve as a disincentive from leaving the organization. The organization must eschew all (or perhaps all but a *de minimis* amount of—see note 14, *supra*) corporate or union funding.

Amicus created a sister 501(c)(4) organization—Alliance for Justice Action Campaign—several years ago. At the time the organization gave serious discussion to operating as an *MCFL* organization. Ultimately the burdens of complying with the restrictions led Alliance for Justice Action Campaign to operate as a more traditional 501(c)(4). Other organizations have made the same choice for the same reasons.

The standard *Amicus* proposes above—permitting non-commercial organizations to broadcast electioneering communications using individual funds—is both effective and substantially less burdensome than BCRA's restrictions on the funds that may be used to pay for these communications. Thus, even if this Court were to find a compelling governmental interest in applying BCRA's electioneering communications restrictions to Appellant, the statute would still be overbroad under a strict scrutiny analysis for its failure to narrow its restriction on speech to the constitutionally required minimum.

For the failure to state a compelling governmental interest and the failure to limit the restriction to only that which is necessary, this Court should find that BCRA's electioneering communications provisions are unconstitutionally overbroad as applied to broadcast communications funded solely by

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ining McConnell's Exception to Buckley's General Rule Protecting Issue Advocacy, 31 N. Ky. L. Rev. 289, 322 n.174 (2004) (citations omitted).

individuals and aired by organizations not formed primarily for commercial or economic purposes.

IV. BCRA's Restrictions On Broadcast Communications Are Also Unconstitutional As Applied To Communications Aired By Organizations Exempt From Federal Income Tax Under IRC Section 501(c)(3).

Because of the unique requirement imposed by their tax-exempt status, as discussed in more detail in Brief of OMB Watch, *et al.*, as *Amici Curiae* in Support of Appellant, there is no rational governmental interest in restricting the use of 501(c)(3) treasury funds for broadcast ads that identify a federal candidate. Alliance for Justice supports these *Amici*. Whether or not this Court issues a ruling to protect the communications described in Section III of this brief, any ruling by this Court should not encumber the constitutional right of 501(c)(3) organizations to be free of BCRA's restrictions on electioneering communications.

Alliance for Justice does feel obliged to comment on fears of the threat posed by those who would exploit a 501(c)(3) exemption to engage in partisan activities forbidden to other corporations under BCRA. It is worth noting that there has been no evidence of such problems, despite the fact that there currently is a regulatory 501(c)(3) exemption from BCRA's electioneering communications restrictions in effect (an exemption that now, unfortunately, is in serious jeopardy).[15]

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[15] The regulation, which *Amici* Alliance for Justice and OMB Watch, among others, had sought in the rulemaking process, was successfully challenged in court on procedural grounds, but the court allowed the regulation to stand while the FEC conducted a new rulemaking. *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005). The FEC is now questioning whether it may promulgate a new rule to retain the exception. Electioneering Communications (Notice 2005-20), 70 Fed. Reg. 49,508 (Aug. 24, 2005).

11 C.F.R. § 100.29(c)(6). Furthermore, any restriction that sought to regulate the speech of all 501(c)(3)s in an attempt to control a small minority of scofflaws would surely be a prime candidate for a constitutional challenge based on overbreadth.

V. BCRA's Restrictions On Broadcast Communications Are Also Unconstitutional As Applied To Communications Funded Solely By Individuals And Where The Content Of The Communication Concerns A Specific Legislative Or Administrative Policy Proposal.

As discussed above, paying for electioneering communications solely with funds from individuals largely eliminates the threat of corruption that this Court has found to justify government restrictions on speech under BCRA and federal election law more generally. When a broadcast communication concerns a matter of public policy, the willingness of any union or corporation to rely solely on funds from individuals should prevent the application of BCRA's electioneering communications restrictions.

McIntyre v. Ohio Election Comm., 514 U.S. 334, 346 (1995), was indicative of this Court's vigilance in protecting communications concerning matters of public policy when it said that speech on public policy "occupies the core of the protection afforded by the First Amendment." Nor is *McIntyre* alone:

> "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).
>
> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was

> to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).
>
> There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citations omitted).

Not only the First Amendment right to speak but also the right to associate is tied to matters of public policy:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).
>
> "[F]reedom to associate with others for the common advancement of political beliefs and ideas is a[n] activity protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (citations omitted).

As recently as *McConnell*, this court upheld BCRA's electioneering communications restrictions against a facial challenge but acknowledged that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell*, 540 U.S. at 208 n. 88.

So close to the heart of the First Amendment is speech on public policy issues that this Court has been willing to protect the speech of corporations and unions on these issues to a greater degree than it has in the context of communications about candidates for office. Compare *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), in which the Court struck down as unconstitutional a Massachusetts law prohibiting corporate expenditures to influence a ballot measure, with *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), in which the Court upheld a statute preventing

corporations (other than *MCFL* organizations) from making independent expenditures in state candidate elections. *See, Austin*, 494 U.S. at 675-76 (Brennan, J., concurring) (distinguishing *Bellotti* on this point) and *Id.* at 678 (Stevens, J., concurring) (also distinguishing *Bellotti*: "there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other").

The test that Appellant proposes to protect its broadcast communications on public policy issues (Jurisdictional Statement at 28) is too narrow. Although the proposed test would permit Appellant to air the ads in this case, the test's general application would unnecessarily chill protected speech by other organizations. In particular, *Amicus* objects to the test's requirement that "the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter" and the prohibition on mentioning "the candidate's record or position on any issue." There is no justification for restricting independent lobbying communications, yet referencing a targeted candidate's position on the issue in question is often necessary to the effectiveness of lobbying communications.[16]

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[16] Any test this Court may craft in ruling on this case must be careful to avoid unconstitutional vagueness or overbreadth. Government efforts to regulate speech must be based on clearly defined standards. *See Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976). A test that requires those seeking to speak on public policy issues to comply with numerous, sometimes subjective, criteria would necessarily be unconstitutionally overbroad and vague. For example, a requirement that communications concern an issue on which an organization has a longstanding interest would effectively ban such communications by organizations newly formed in response to the policy matter at issue. A requirement that the communications run outside BCRA's blackout periods ignores both the limited resources of organizations and the reality, discussed above, that

In light of this recognition of the importance of speech on public policy issues, no restriction on such speech can withstand strict scrutiny under the First Amendment. This Court has not found sufficient justification for allowing restrictions of corporate or union communications on policy issues, and as discussed in detail above, the use of individual funds is a further safeguard for the system. As a result, there is no compelling governmental interest in restricting broadcast communications on legislative or administrative policy proposals and supported solely with individual funds, and this Court should declare BCRA unconstitutionally overbroad as applied to such broadcast communications.[17]

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some public policy issues are only under consideration during those periods. A requirement that communications subject to heightened constitutional protection not "promote, support, attack, or oppose" a candidate offers no guidance to an organization as to whether it may air a broadcast message during a lobbying effort that criticizes the stance taken on the policy issue by an incumbent legislator.

[17] There are compelling arguments that First Amendment protections for communications on public policy issues are so great that BCRA is unconstitutionally overbroad with regard to all such communications and that corporations and unions should be allowed to spend general treasury funds for such broadcast messages. However, Appellant's willingness to use only funds from individuals to pay for its ads would allow this Court to rule for Appellant even absent such a determination.

CONCLUSION

For the reasons discussed above, *Amicus* urges the Court to find in favor of Appellant's as-applied challenge to BCRA's restrictions on broadcast communications and to craft a rule that guides other organizations that might likewise be unconstitutionally burdened with application of this statute.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 53 national and international labor organizations with a total membership of 9 million working men and women, files this brief *amicus curiae* in support of Appellant with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS*

As a plaintiff in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (No. 02-1755), the AFL-CIO brought a facial challenge, under the First Amendment to the United States Constitution, to § 203 of the Bipartisan Campaign Reform Act ("BCRA") of 2002, 2 U.S.C. § 441b(b)(2) and (c) (amending the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*), which proscribes union and corporate funding of "electioneering communications."[2] The AFL-CIO did so because this provision

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[2] BCRA § 201(a), 2 U.S.C. § 434(f)(3)(A)(i), contains what is generally termed the "primary definition" of this term, and 2 U.S.C. § 434(f)(3)(A)(ii) contains a "back-up definition" that would apply instead if the primary definition were held to be unconstitutional. The primary definition includes a transmission element ("any broadcast, cable or satellite communication"); a content element ("refers to a clearly identified candidate for Federal office"); a temporal element (within 60 days before "a general, special or runoff election," or within 30 days before "a primary or preference election" or nominating "convention or caucus" "for the office sought by the candidate") and an audience element ("can be received by 50,000 or more persons" in the relevant electoral jurisdiction). *See McConnell*, 540 U.S. at 189-90. The term "clearly identified" means the candidate's "name," "photograph" or "drawing," and where "the identity of the candidate is apparent by unambiguous reference" otherwise. See 2 U.S.C. § 431(18). As elaborated by a Federal Election Commission ("FEC") regulation, "the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent'", or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'" See 11 C.F.R. § 100.29. A person becomes a "candidate" under FECA upon receiving contributions or making expenditures in excess of $5,000, *see* 2 U.S.C. § 431(2)(A), a threshold routinely met by incumbent Members of Congress almost immediately after winning their most recent election. *See also* 11 C.F.R. § 100.3. As a practical matter, only a Member of Congress who has announced retirement or lost a nomination contest is not a "candidate" at all times, including those periods to which § 203 applies.

threatened to impair the organization's use of the broadcast medium as a legislative and policy advocacy tool. The AFL-CIO placed in the record of that case compact discs and videotapes of television and radio advertisements it had sponsored in every year since 1995. See No. 02-1755, Brief of AFL-CIO Appellants/Cross-Appellees at 1-7 and Declara tion of Denise Mitchell, Exhs. 1-22. The Court rejected that challenge, however, and, without specifically addressing the AFL-CIO's submission, found that the various plaintiffs had not "carried their heavy burden of proving that [§ 203] is overbroad." *See* 540 U.S. at 203-11. In rejecting the right to challenge § 203 as applied to specific radio and television ads, the decision of the three-judge court in this case marks a further incursion into the right of the AFL-CIO, its affiliates and their members to engage in legislative and policy advocacy in support of workers and their families.

SUMMARY OF ARGUMENT

1. A holding that under no circumstances may BCRA § 203, which proscribes union and corporate funding of election- proximate broadcast "electioneering communications," be subject to an as-applied challenge would unwarrantedly conflict with the Court's longstanding First Amendment jurisprudence. An as-applied challenge has always been the recognized remedy against a statute that is not unconstitutionally overbroad but ought not apply to particular circumstances.

The FEC argued that such as-applied challenges were available when it successfully defended § 203 against the facial overbreadth challenge brought in *McConnell*. The FEC's contentions now that *McConnell* precluded such challenges, and was right to do so, are incorrect. Article III limits courts to resolving only the cases before them. The Court in *McConnell* recognized that § 203, while not fatally overbroad, encompassed some "genuine issue advocacy," and it specifically noted the availability of as-applied challenges to

other BCRA provisions that it also upheld against similar facial challenges. None of the passages in *McConnell* upon which the FEC relies supports a conclusion that the Court foreclosed as-applied challenges to § 203.

The "genuine issue ads" that might be subject to such challenges comprise core First Amendment speech, implicating both the right to petition the government and speech on matters of public concern. For example, the broadcast references that trigger § 203 include any discussion of most Members of Congress, and often of the President and the Vice President, regardless of any actual electoral considerations. The Government's preference for a "bright-line" rule provides no compelling state interest in infringing First Amendment rights, and Congress itself authorized the FEC to issue regulations creating exemptions to § 203 that did not follow bright-line rules.

Nor can Congress require unions and corporations to finance genuine issue ads with FEC-regulated separate segregated funds comprised of individual voluntary contributions. *McConnell* nowhere suggested that such a requirement would be constitutional, and forcing a non-electoral entity like a union to employ an electoral entity to convey a non-electoral message violates the First Amendment because, under FECA, doing so requires declarations of political status and electoral intent. The separate segregated fund requirement is also unduly burdensome for this speech, particularly for unions and other groups that use hierarchical affiliate structures subject to FECA's affiliation rules.

2. Section 203 is constitutional only insofar as it regulates "the functional equivalent of express advocacy." Under *McConnell*, this includes messages that do not merely pertain to candidacy or an election, but that also seek to persuade voters to make particular voting decisions about referenced candidates.

An appropriate standard for defining a "genuine issue ad" not regulable by § 203 is that, first, the broadcast either (a) does not refer to candidacy, a political party or an election, or (b) refers either to candidacy, an election or both, but does not do so in a manner so as to cause the viewer or listener to make a particular voting decision with respect to the referenced candidate; and, second, the broadcast has a substantial legislative or other non-electoral purpose. This standard adequately protects First Amendment speech and affords the scope Congress intended for § 203. If ads that should be regulated by § 203 satisfy this standard, the FEC can seek instead to enforce BCRA's "back-up definition" of "electioneering communication," which applies if the primary definition is invalidated.

The three ads in the case at bar are "genuine issue ads" under this proposed standard, and in deciding this case the Court should not conclusively determine that particular aspects of them must be present or absent in order to find "genuine issue ad" status.

3. *McConnell* did not distinguish among most § 203-regulated groups in upholding § 203 against the facial overbreadth challenge. Even if the Court concludes in this case that appellant Wisconsin Right to Life, Inc. ("WRTL") has special characteristics that merit protection, it should not foreclose the possibility that unions and other entities could pursue as-applied challenges. *McConnell* did not disturb the Court's longstanding First Amendment jurisprudence that the identity of the speaker on public matters does not affect the inherent worth of its speech. And, the Court has long recognized that labor organizations play a vital role as public advocates for legislation and policies that benefit their members and all workers, and they have a strong interest in broadcasting genuine issue ads in furtherance of those goals.

ARGUMENT

I. Section 203 Must Be Subject to As-Applied Challenges to Protect Speech That Is Not the "Functional Equivalent" of Express Advocacy

1. A holding in this case that under no circumstances may § 203 be subject to an as-applied challenge would mark a significant and unwarranted departure from the Court's First Amendment jurisprudence. The Court has long and consistently considered that the necessary corollary of a holding that a statute is *not* facially overbroad is that circumstances not then before the Court might arise where the statute's specific application *would* be unconstitutional and so that application may be challenged in an appropriate case. The invalidation "criterion" of "substantial overbreadth" guards against striking down an entire statute that "covers a whole range of easily identifiable and constitutionally proscribable . . . conduct" merely because there is "some possibly impermissible application"; *"[i]n such a case*, the Court has required a litigant to demonstrate that the statute 'as applied' to him is unconstitutional." *Secretary of State of Md. v. Joseph H. Munson Co*, 467 U.S. 947, 964-65 (1984) (interior quotation marks omitted) (emphasis added). *See also City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 784 (2004); *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 834 (2000); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998).

Notably, the possibility of an as-applied challenge is explicitly acknowledged in each of the two decisions upon which the Court relied in *McConnell*, 540 U.S. at 207, in rejecting plaintiffs' overbreadth claims concerning § 203. *See Virginia v. Hicks*, 539 U.S. 113, 124 (2003); *Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973). And, the Court has recognized and resolved on their merits as-applied challenges to campaign finance regulation similar to that at issue here.

See Federal Election Commission v. Beaumont, 539 U.S. 146 (2003) (upholding application to non-profit advocacy corporation of FECA corporate contribution limits previously upheld against a facial challenge in *Buckley v. Valeo*, 424 U.S. 1, 23-35 (1976)); *Colorado Federal Republican Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (invalidating application to political party independent expenditures of FECA provision limiting party expenditures in connection with candidates); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238 (1986) (upholding non-profit advocacy corporation's as-applied challenge to FECA's ban on corporate independent express-advocacy expenditures); *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982) (upholding minor political party's challenge to state's disclosure requirements concerning contributors and recipients of disbursements). *See also Buckley*, 424 U.S. at 74 (recognizing possibility of as-applied challenges to FECA disclosure requirements by minor political parties). *Cf. McConnell*, 540 U.S. at 211 (imposing "reasonable limiting construction" that § 203 does not apply to *MCFL* corporations despite the absence of an exception on its face, "presum[ing]" congressional awareness of *MCFL* in enacting BCRA, and noting the FEC's explicit concession to the Court that § 203 could not so apply). We have not located any instance where this Court has upheld a statute against a facial overbreadth claim and, either in doing so or in a subsequent decision, foreclosed the possibility of an as-applied challenge to that statute in every possible case.

2. In defending § 203 from the facial challenge brought in *McConnell*, the FEC relied upon the availability of as-applied challenges to that provision as reasons why plaintiffs' facial overbreadth claims against it should fail. See Brief for the Federal Election Commission, *et al.* at 78, 105-06, *McConnell v. FEC*, 540 U.S. 93 (Nos. 02-1674, *et al.*); Brief of Defendants at 64, 161, *McConnell v. FEC*, 251 F. Supp. 2d

176 (D.D.C. 2003).[3] The FEC now contends, however, that the *McConnell* decision bars these as-applied claims and that it was right to do so. See Motion to Dismiss or Affirm at 10-14 (July 2005). But the FEC's reading of that decision in this regard is not dictated by its text, especially when considered against the backdrop of the Court's First Amendment jurisprudence described above.

First, the FEC's reading of *McConnell* flies in the face of Article III's mandate that courts, including this one, should decide only the cases before them and not hypothetical disputes that may arise in the future. As the Court stated in *McConnell*, "[w]e have long rigidly adhered to the tenet never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . for the nature of judicial review constrains us to consider the case that is actually before us . . . ." *Id.* at 192 (interior quotation marks and citations omitted). Thus, with respect to § 203's prohibition of union and corporate disbursements for "electioneering communications," the Court in *McConnell* dealt only with facial overbreadth and underinclusiveness challenges that, had either succeeded, would have invalidated § 203's application to all regulated entities in all circumstances. *Id.* at 203-09. The Court did *not* rule that § 203 is constitutional with respect to every case that ultimately might come before it. Indeed, the FEC's reading of *McConnell* would bar as-applied challenges to § 203 not only in pre-enforcement cases such as this one, but such challenges raised as defenses in civil and criminal enforcement cases as well. This is an extraordinary notion of how the Court traditionally operates, let alone of the judicial function itself.

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[3] The congressional sponsors of BCRA, who intervened in *McConnell* as co-defendants of the FEC, made the same argument. See Brief for Intervenor-Defendants Senator John McCain, *et al.* at 64, 74-75, *McConnell*, 540 U.S. 93 (Nos. 02-1674, *et al.*)

Second, the Court in *McConnell* plainly recognized that § 203 reaches some broadcast ads that are entitled to First Amendment protection without in any way suggesting that such violations are beyond the authority of the courts to remedy. Thus, the Court explicitly stated that the constitutionally sufficient justifications for § 203 applied only "*to the extent that* the issue ads broadcast during the [pre-election] periods . . . are the functional equivalent of express advocacy," that is, "*if* the ads are intended to influence the voters' decisions and have that effect"; "the *vast majority* of ads" reflected in the record "clearly had such a purpose"; and, in contrast, § 203's application to "pure issue ads" was not "substantial." *See id.* at 206, 207 (emphasis added). Indeed, while the Court noted the "dispute" among the parties and within the three-judge court as to "the precise percentage" of election-proximate ads in the record that were "genuine issue ads," *id.* at 206, every party and district judge in *McConnell* acknowledged that *some* ads run during the § 203 blackout periods *were* "genuine issue ads." The Court's own conclusion to the same effect counsels strongly against a reading that an as-applied challenge could never be brought.

Third, the Court in *McConnell* noted the availability of as-applied challenges to other BCRA provisions that it upheld against similar First Amendment-based facial attacks. For example, the Court invoked § 203's "stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey messages of support or opposition," *id.* at 239 (emphases in original), in upholding BCRA's similarly inclusive requirement at § 504, 47 U.S.C. § 315(e), that broadcasters maintain records of *all* "election message requests""[g]iven the nature of *many* of the messages," *id.* (emphasis added), while observing that those "adversely affected" by § 504 "remain free . . . to challenge the constitutionality of § 504 as applied." *Id.* at 244. *See also id.* at 198-99 (rejecting plaintiffs' facial challenge to BCRA's requirement, at 2 U.S.C. § 434(f)(2)(A), (B) and (D), that

lawful disbursers make disclosures of electioneering communications and noting that this "does not foreclose possible future challenges to particular applications of that requirement").

The district court cited these and other references in *McConnell* to the availability of as-applied challenges to BCRA provisions other than § 203 as indications that the Court intended to permit no such challenge to any application of § 203. See Memorandum Opinion and Order at 4-6, No. 04-1260 (D.D.C. Aug. 17, 2004). But that analysis treats this Court's decision as if it were subject to a strict canon of statutory construction. In fact, the Court has never suggested that in ruling against a facial overbreadth challenge it must specifically state that later as-applied challenges are available in order to make them so. *See, e.g., United States v. American Library Association*, 539 U.S. 194 (2003) (no mention of later as-applied challenge option); *id.* at 215 (Kennedy, J., concurring) (mentioning option). There is in fact no reason to distinguish § 203 from these other BCRA provisions for which as-applied challenges were recognized, and the FEC has suggested none.

The FEC, however, cites two specific passages in *McConnell* as holding that as-applied challenges are unavailable. See Motion to Dismiss or Affirm at 11-12. First, the FEC points out, the Court stated that it declined to reach the merits of plaintiffs' challenge to BCRA's "back-up" definition of "electioneering communication" because the Court "upheld all applications of the primary definition . . . ." 540 U.S. at 190 n. 73. But this passage appears in a footnote to the Court's quotation of the primary definition itself, and nearby text introduces the Court's subsequent analysis as dealing with "[p]laintiffs[']' challenge [to] the constitutionality of the new term *as it applies* in both the disclosure and expenditure contexts." *Id.* at 190 (emphasis added). The Court then did uphold "all" such "applications," again, however, explicitly

subject to as-applied challenges with respect to its disclosure aspects, and implicitly subject to them with respect to its disbursement aspects.

Second, the FEC relies upon the following oblique passage addressing the *extent* to which § 203 may reach ads that are protected by the First Amendment:

> Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.[88]
>
> We are therefore not persuaded that plaintiffs have carried their heavy burden of proving that amended FECA § 316 (b)(2) is overbroad. See *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).
>
> [88] As JUSTICE KENNEDY emphasizes in his dissent, *post*, at 326-328, we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads . . . .

McConnell, 540 U.S. at 206-07. But this passage does *not* say that as-applied challenges are precluded; rather, the options it mentions are among the factors the Court relied upon to reach its conclusion that § 203 is not unconstitutionally overbroad. In contrast, the availability of an as-applied challenge is not relevant to the issue of whether or not a statute *is* overbroad; rather, as noted above, its availability is the constitutionally required consequence of a holding that a statute is *not* overbroad. Where a statute is "not substantially overbroad"—and is, therefore, facially constitutional—"*whatever* overbreadth may exist should be *cured* through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. at 615-16 (emphasis added). *See also New York v. Ferber*, 458 U.S. 747, 774 (1982).

3. The "genuine issue ads" that unions and corporations could not finance in the absence of an as-applied challenge constitute political speech at the core of the First Amendment. The majority in *McConnell* did not elaborate about what makes ads "genuine" other than describing what does *not*—namely, "electioneering speech," *id.* at 193, that is, "the functional equivalent of express advocacy" because "intended to influence the voters' decisions and hav[ing] that effect," *id.* at 206. But the Court plainly had in mind at least "discussion of political policy or advocacy of the passage or defeat of legislation"; for, it quoted *Buckley*'s equation—for purposes of entitlement to First Amendment protection—of that speech with "'[a]dvocacy of the election or defeat of candidates for federal office'" before explaining why, nonetheless, the government has a compelling interest in regulating certain sources of the latter. *See McConnell*, 540 U.S. at 205, quoting *Buckley*, 424 U.S. at 48.

The Court has repeatedly recognized the right to petition the government as "one of the most precious of the liberties safeguarded by the Bill of Rights, . . . and . . . implied by the very idea of a government, republican in form," *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (interior quotation marks, citations and brackets omitted), and it is entitled to "a wide measure of 'breathing space' protection," *id.* at 531, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). More broadly, "speech on public issues occupies the '"highest rung of the hierarchy of First Amendment values,"' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983), quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), and *Carey v. Brown*, 447 U.S. 455, 467 (1980). "At the heart of the First Amendment's protection" is speech on '"issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period,"' *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 308 U.S. 88,

102 (1940). *See also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346-47 (1995).

It bears emphasis on this point that § 203 proscribes *all* union- and corporate-financed broadcast references to *all* Members of Congress who are also candidates, even if they are literally unopposed for reelection or, as is the case for so many of them as a consequence of congressional redistricting, the "functional equivalent" of being so. And, the proscription also applies to references to the incumbent elected leaders of the Executive Branch, the President and the Vice President, when either is a candidate for reelection or the Vice President is a candidate for the presidency.[4] As both history and contemporary circumstances make clear, the *official* conduct of the President and the Vice President is a matter of the most acute public concern irrespective of their electoral ambitions and prospects. Yet § 203 uniquely insulates them from broadcast issue speech. Indeed, during the 2003-04 election cycle, the first to which BCRA applied, it was a federal crime for union- or corporate-financed broadcast advertising to refer in any manner to President Bush during substantial periods of time and locations while he was an *unopposed* candidate in caucuses and primaries for the Republican Party nomination; that proscription continued throughout the 50 states with respect to both President Bush and Vice President Cheney during the 30-day period prior to the August 30—September 2, 2004, Republican National Convention, even though their nominations were foregone conclusions; and it then continued without pause during the 60 days remaining before the November 2 general election.[5] There is no governmental

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[4] That situation, in fact, has long been the norm, holding true for every single presidential election year since 1932; and, in only 1952 was the incumbent President or Vice President not one of the eventual major-party presidential nominees.

[5] Specifically, beginning on December 14, 2003, 30 days before the first primary or caucus, § 203 precluded broadcast references to Presi-

interest, let alone a compelling one, in barring genuine issue communications referring to the President or the Vice President during those periods.

4. Notwithstanding the protected nature of the genuine issue advertising prohibited by § 203, the FEC contends that as-applied challenges should be precluded because allowing them "would substantially undermine Congress's effort to develop an objective bright-line rule." See Motion to Dismiss or Affirm at 14. In *MCFL* the Court squarely rejected the same argument, holding that where "the rationale for restricting core political speech is simply the desire for a bright-line rule[, t]his hardly constitutes the *compelling* state interest necessary to justify *any* infringement on First Amendment freedom." 479 U.S. at 263 (first emphasis in original; second emphasis added). Bright-line rules have been accepted in areas implicating First Amendment freedoms only in order to *protect* speech from governmental interference, not to facilitate governmental enforcement of *restrictions* on speech. Thus, in *Buckley*, the Court fashioned the bright line of express advocacy in order to clarify and narrow a vague and overbroad statute that otherwise would have trammeled upon non-electoral issue speech and unduly inhibited speakers uncertain about how their speech might be perceived, 424 U.S. at 42-44; and, the Court then invalidated FECA's $1,000 limit on spending for *all* such independent express-advocacy speech, because substantively identical (in *McConnell*'s terms, "functionally equivalent") but unregulated linguistic for-

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dent Bush in a series of geographic blackouts that continuously rippled throughout the nation, blocking every broadcast outlet, wherever located, whose signal could reach 50,000 persons in an upcoming primary or caucus state, until June 8, 2004. Additional 30-day blackout periods transpired from July 18 until the August 17, 2004 Wyoming caucus, and from July 25 until the August 24 Alaska primary. This blackout became national in scope on July 31, 30 days before the Republican National Convention, and it then continued until the November 2 general election.

mulations were available, *id.* at 45-46—an analysis the *McConnell* Court reaffirmed. 540 U.S. at 190-92.

Moreover, Congress itself did not seek to maintain a "bright line" where the application of § 203 would have inappropriate consequences. Thus, the statute authorizes the FEC by regulation to exempt from its proscription "any . . . communications to ensure the appropriate implementation" of the primary definition, so long as the communication does not "promote[] or support[]" or "attack[] or oppose[]" a "clearly identified federal candidate." See 2 U.S.C. § 434(f)(3)(B)(iv), incorporating by reference 2 U.S.C. § 431(20)(A)(iii).[6] The need for a "bright-line" standard can hardly be regarded as compelling when Congress itself allowed less than bright-line exceptions to be created.

5. There is also no constitutional basis for requiring unions and corporations to finance their genuine issue advocacy by establishing, administering and funding, through solicitation of individual voluntary contributions, a separate segregated fund. First, the Court in *McConnell* stated that "[t]he ability to form and administer separate segregated funds authorized by FECA § 316, 2 U.S.C. § 441b . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in *express advocacy*," 540 U.S. at 203

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[6] While the Court upheld against a vagueness challenge this "promote," etc. language—at least as it applied to political parties, due to their inherently electoral nature—the Court did not declare that these words painted a bright line and acknowledged that it might be necessary under some circumstances "to seek advisory opinions for clarification" from the FEC. See *McConnell*, 540 U.S. at 170 n. 64. We also note that the Court did not explain its conclusion that this language provided clear (if not necessarily "bright-line") guidance, and the FEC largely eschewed exercising its exemption authority in its rulemaking on "electioneering communications" because it could not determine whether the language applied to numerous circumstances suggested to it during the notice-and-comment period. See FEC, Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200-03 (October 23, 2002).

(emphasis added), and BCRA "extend[s]" that requirement to payment for "electioneering communications," *id.* at 204, but the Court specifically refrained from suggesting that separate segregate funds comprise a constitutionally adequate alternative where "genuine issue ads" are concerned. *See id.* at 206.

Second, political committee status under FECA entails compelled declarations of political status and electoral intent with respect to "electioneering communications"[7] that directly contradict the true nature of *non*-electoral speech and undermine its persuasive appeal. Requiring a non-electoral entity like a union to employ an electoral entity as the sponsor of its non-electoral message violates the First Amendment "principle of autonomy to control one's own speech," *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995); *see generally Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197-200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. at 341-42; *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988); *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 11 (1986), and deprives the organization and its members of the "right . . . to advocate their cause" by "what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

Finally, as applied to genuine issue speech, the segregated fund requirement also entails unduly complicated and burdensome administrative and other requirements. In *MCFL* the

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[7] FECA requires a federal PAC communication to identify its federal PAC sponsorship, see 2 U.S.C. § 441d(a)(1), and further requires the PAC to file a report with the FEC that states "[t]he *elections* to which the electioneering communications pertain," 2 U.S.C. § 434(f)(2)(D) (emphasis added). This statement "shall be made under penalty of perjury," 2 U.S.C. § 434(f)(2), and the report is promptly posted on the FEC's publicly accessible website. See 2 U.S.C. § 434(a)(11)(B).

Court held that those burdens made it a "severely demanding task" for a nonprofit ideological corporation to engage in express-advocacy independent expenditures. 479 U.S. at 256. That burden is at least as severe for unions that wish to broadcast genuine issue advocacy speech that poses no greater threat of corruption or its appearance than does an *MCFL* organization itself. And, for unions and other organizations that operate in a hierarchical, affiliated structure, typically only the national affiliate sponsors and controls a federal PAC because FECA treats all affiliates of a national organization as comprising a single entity for purposes of political committee sponsorship, fundraising and spending.[8] See 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 110.3(a)(2)(ii) and (iii). Absent as-applied recourse, a typical union must either create its own PAC to fund genuine issue advocacy "electioneering communications" or try to persuade its national parent affiliate —perhaps on very short notice to deal with an immediate and unforeseen legislative problem—to spend its own precious PAC money, which it raised for contributions and express-advocacy spending, for the affiliate's issue speech—which then, for reasons just explained, would have to be publicly misattributed to that PAC. None of these burdens can be justified as serving any, let alone a compelling, governmental interest.

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[8] So, for example, there are over 30,000 labor organizations in the private sector alone, most of which are small organizations with modest treasuries, see "Record-Keeping Under the Labor Management Reporting and Disclosure Act (LMRDA): Do DOL Reporting Systems Benefit the Rank and File?", Joint Hearing Before the Subcommittee on Workforce Protections and the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, 107th Cong., 2d Sess. 115-16 (2002), but there are only 328 union-sponsored federal political committees. http://www.fec.gov/press/press2005/20050412pac/sumhistory.pdf.

II. "Functional Equivalence" Requires That the Message Is Intended to Cause a Particular Voting Decision Concerning the Candidate Referenced in the Advertisement; Other Messages Should Be Treated As "Genuine Issue Ads" Not Regulable by Section 203

If an as-applied challenge to § 203 may be brought, the next issue is how to determine when that provision cannot be applied to a particular "electioneering communication." The test explicated in *McConnell* is that the communication must be "the functional equivalent of express advocacy," that is, an ad that is "intended to influence the voters' decisions and hav[ing] that effect." 540 U.S. at 207. Similarly, the Court stated that non-express advocacy ads are "functionally identical" to express advocacy ads if they are "used to advocate the election or defeat of a clearly identified candidate," *id.* at 126 (echoing the original *Buckley* formulation, see 424 U.S. at 80 (footnote omitted)), and "are specifically intended to affect election results . . . ." 540 U.S. at 127. And, in discussing the primary definition, the Court referred to ads that "although . . . not urg[ing] the viewer to vote for or against a candidate in so many words, . . . are no less clearly intended to influence the election," *id.* at 193 (footnote omitted), illustrating this concept with quotes from a "striking example," a 1996 Montana ad that compared a congressional candidate's alleged assault of his wife and failure to pay child support with his legislative voting record. *Id.* at 193 n. 78. The Court also attributed a "vote-for" message to ads that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *See id.* at 127 (footnote omitted).[9] In sum, then, a broadcast advertisement is the "functional equivalent of express advocacy" not merely

[9] The Court did not directly discuss either the content of other particular advertisements in the record or other specific formulations of advertisements.

because it *pertains* to candidacy or an election, but because its reference to the candidate *also* seeks to persuade a voter to make a particular voting decision with respect to that candidate.

Consistent with *McConnell*, a standard that defines "genuine issue advocacy" to which § 203 cannot constitutionally be applied should preserve the reach of § 203 insofar as the Court upheld it; accommodate the compelling First Amendment interests that require as-applied exceptions to § 203; and enable speakers, often in exigent circumstances, to proceed without having to "'hedge and trim'" their speech. *See Buckley*, 424 U.S. at 43, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945). We believe such a standard is comprised by the following test:

> *First, the broadcast either (a) does not refer to candidacy, a political party or an election, or (b) refers either to candidacy, an election or both, but does not do so in a manner so as to cause the viewer or listener to make a particular voting decision with respect to the referenced candidate; and*
>
> *Second, the broadcast has a substantial legislative or other non-electoral purpose.*

Element 1(a) ensures that an advertisement makes no partisan or electoral references by excluding mention of a candidate *qua* candidate, a political party or the election itself. Satisfaction of this element is easily determined by examination solely of the four corners of the ad itself. Alternatively, Element 1(b) would permit a speaker to refer to candidacy or an election in order to raise a particular issue in the context of the election, such as either to influence all of the candidates to address the issue in the campaign or to influence the electorate to consider the issue when they vote. But the speaker could not indicate its preferred position on the issue, suggest what position the candidates should take, or suggest what

position the voters should prefer in deciding which candidate to vote for.

Element 2 affirmatively requires that the advertisement have a clear purpose other than influencing the outcome of an upcoming election. A substantial legislative purpose both implicates core First Amendment non-electoral speech and is the most likely non-electoral purpose of an advertisement that refers to an incumbent legislator who is a candidate. The allowance of a substantial other non-electoral purpose takes into account the possibility that the reference neither pertains to a legislative matter nor has an electoral purpose. The presence of either substantial purpose would often be ascertainable solely by examining the content of the ad; otherwise it would be subject to determination by ordinary standards of proof.

The texts and circumstances of six exemplars of broadcast advertisements that would satisfy Elements 1(a) and 2 are detailed in District Judge Leon's opinion in *McConnell v. FEC*, 251 F. Supp. 2d at 488-96, as "[r]epresentative [e]xamples of [g]enuine [i]ssue [a]dvertisements" that would have been subject to § 203 had it been in effect; all are AFL-CIO ads from 1998 and 2000. Each ad discusses a current legislative issue and refers to the candidate (each an incumbent Member of Congress) only in calling on him or her to take particular action on the issue. *See id.* One of the ads, called "Deny," aired in September 1998 in 17 substantially identical versions, 13 of which referred to Senators who were not candidates in the upcoming general election, and four of which referred to Senators who were candidates. *See* No. 02-1755, Brief of AFL-CIO Appellants/Cross-Appellees at 6, *McConnell v. FEC*.

This test for recognizing genuine issue advocacy should be adequate both to protect core First Amendment speech that § 203 otherwise prohibits unions and corporations from financing, while leaving to § 203's regulation the kinds of ads

with which Congress was concerned. The Court should recognize, however, that any such problematic ads that nonetheless might slip through the proposed constitutional filter could still be subject to the FEC's enforcement authority under the back-up definition of "electioneering communication," namely:

> Any broadcast, cable or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

2 U.S.C. § 434(f)(3)(A)(ii). Congress enacted this provision in order to maintain an "electioneering communication" rule in the event that the primary definition was "held to be constitutionally insufficient by final judicial decision to support the regulation provided herein . . . ." *Id.*[10] Although Congress arguably intended that this standard apply only in the event of a *facial* invalidation of the primary definition, see 147 Cong. Rec. S2704-12 (daily ed. March 22, 2001); 147 Cong. Rec. S3119-20, S3122-23 (daily ed. March 29, 2001), the statute does not make that distinction and it is broad enough to apply whenever the primary definition has been invalidated as applied to a particular advertisement. An advertisement that contains no partisan or electoral references, has a substantial legislative or other non-electoral purpose, and does not satisfy the backup definition can safely be considered a genuine issue ad. But where the FEC could demonstrate that an ad *is* covered by the back-up definition, the fact that the primary definition did not apply would be of no

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[10] As noted earlier, because the Court in *McConnell* upheld the primary definition against plaintiffs' facial challenge, it did not reach the merits of plaintiffs' facial challenge to the back-up definition. *See* 540 U.S. at 190 n. 73.

consequence, as the ad then would be subject to § 203's requirements.

In the case at bar, appellant WRTL has identified 16 features of the three ads at issue that, it contends, demonstrate that these ads in fact "are authentic grass-roots lobbying and not electioneering . . . ." Jurisdictional Statement at 5-6. Under the proposed test, these ads plainly satisfy Elements 1(a) and (2), and the record strongly suggests that none of them would satisfy the back-up definition. However, while WRTL emphasizes many aspects of its advertisements in contending that they are not the "functional equivalent of express advocacy," the presence or absence of most of them should not be prerequisites to status as a "genuine issue ad." We urge the Court instead to articulate the essential elements of a viable standard while not requiring or foreclosing consideration of other precise factual circumstances, many of which might not now be easily foreseeable.

III. The Court Should Not Foreclose the Possibility That Labor Organizations or Other Entities Regulated By Section 203 Could Pursue As-Applied Challenges

With the sole exception of *MCFL* corporations, *McConnell* did not distinguish among the various entities regulated by § 203 in analyzing the record of their broadcast advertising practices, and the Court upheld that provision against the facial overbreadth challenges on the basis of the nature of the speech that it covered. The current as-applied challenge is brought by appellant WRTL, which describes itself as "a nonprofit, nonstock, ideological Wisconsin corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code [that] does not qualify for any exception"—including that established by *MCFL* —"permitting it to pay for its [electioneering communications] from [its] corporate funds." Jurisdictional Statement at

5. In addressing the appellant's claims, and in consideration of the positions expressed by other *amici* in support of the appellant, even if the Court concludes that WRTL has characteristics that merit special treatment, it should not foreclose the ability of unions and other entities regulated by § 203 whose claims are not before the Court in this case to make out content-based as-applied challenges in future cases.

In addition to the Article III concerns discussed earlier, the Court's longstanding First Amendment jurisprudence rejects the proposition that particular kinds of speakers can be restricted in financing the kinds of "genuine issue ads" that such a challenge would seek to protect. Where a speaker on *non*-electoral matters of public concern is a labor union, a corporation or some other organized group, no lesser or different First Amendment protection is at stake than it would be for a different speaker, because "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. at 777. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments," including "the source and credibility of the advocate." *Id.* at 791-92 (footnotes omitted).

In *Bellotti*, the Court invalidated a criminal statute barring corporations from making contributions or expenditures in connection with ballot measures, because such advocacy "affords the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783 (footnote omitted). "The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Id.* at 790. *See also Pacific Gas & Electric Co. v. Public Utilities Comm.*, 475 U.S. at 8-9 (state cannot require corporation to include statements of citizens group in its newsletter to customers); *Consolidated Edison*

Co. v. Public Service Comm., 447 U.S. 530 (1980) (state cannot preclude corporation from including with customer bills its own newsletter that discusses public policy matters). *Cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 297 (1981) (state cannot limit contributions, by any source, to ballot measure committee). In *McConnell* the Court said nothing to place this jurisprudence in question.

Indeed, the interest of a particular group in broadcasting a genuine issue ad, even close to an election, is as strong and vital as the interest of the public in receiving that message. For example, whatever interest the government may have in restricting express advocacy or its pre-election "functional equivalent" when it is broadcast and paid for by the AFL-CIO or a labor union, the Court has long recognized and afforded protection to the vital role of labor organizations in the *non*-electoral public arena as advocates for legislation and public policies in the interests of both their members and all workers. *See generally Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991); *Ellis v. Bhd. of Railway and Airline Clerks*, 466 U.S. 435, 446 (1984); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 227-32 (1977); *Pipefitters v. United States*, 407 U.S. 385, 402-32 (1972); *Machinists v. Street*, 367 U.S. 740, 767 (1961); *id.* at 798, 800-03, 812-16 (Frankfurter, J., dissenting)[11]; *United States v. United Automobile Workers*, 352

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[11] Of the AFL-CIO itself and its predecessor, the AFL, Justice Frankfurter wrote over 40 years ago:

> American labor's initial role in shaping legislation dates back 130 years. With the coming of the AFL in 1886, labor on a national scale was committed not to act as a class party but to maintain a program of political action in furtherance of its industrial standards . . . When one runs down the detailed list of national and international problems on which the AFL-CIO speaks. . . .[t]he notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages,

U.S. 567, 578-86 (1957); *United States v. CIO*, 335 U.S. 106, 115-21 (1948); *id.* at 143-46 (Rutledge, J., concurring).[12] The case at bar provides no occasion to foreclose the ability of labor organizations to vindicate that role through an as-applied challenge to § 203.

> hours, and conditions of employment. And this Court accepts briefs as *amici* from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to and insulated from economic interests. It is not true for industry or finance. Nor is it true for labor.

Machinists v. Street, 367 U.S. at 812, 814-15 (Frankfurter, J., dissenting) (footnotes omitted).

[12] Unions are voluntary associations that employees may join and quit at will. *Pattern Makers League v. NLRB*, 473 U.S. 95, 104-07 (1985). Moreover, as the Court has observed, unions have "crucial differences" from corporations: although unions too "may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure," and "the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66 (1990). As *Austin* summarized, *id.* at 665, a union that is the exclusive bargaining representative for a unit of workers may not compel a represented non-member to support, with dues or other fees, the union's political, legislative and ideological expenditures deemed non-directly germane to collective bargaining and contract administration. *See generally Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Abood v. Detroit Bd. of Education, supra; Machinists v. Street, supra.* The same analysis applies, of course, to support the conclusion that a union is far more likely than a corporation to reflect its members' views in the union's *non*-electoral legislative and other policy advocacy.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From
The United States District Court,
District Of Columbia

BRIEF FOR *AMICUS CURIAE* DOUGLAS L. BAILEY IN SUPPORT OF APPELLEE

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INTEREST OF *AMICIUS CURIAE*

Douglas L. Bailey was a pioneer in the field of political campaign consulting.[1] In 1968, Mr. Bailey co-founded Bailey, Deardourff & Associates, which was one of the first national political consulting firms in the United States. As a campaign consultant, Mr. Bailey has provided countless candidates for elected office with a full array of campaign services, including the development of overall strategies and themes and the creation of both print and broadcast advertisements to implement those strategies and themes. His clients have included Gerald Ford's 1976 Presidential Campaign, and various Republican candidates for Governor, Congress, and the Senate. He has consulted on over fifty successful campaigns for Governor and the United States Senate in seventeen states.[2] Mr. Bailey also has extensive experience consulting on various citizens initiatives and other grassroots issue campaigns.[3]

Mr. Bailey was among the first eight recipients of the American University-Campaign Management Institute's "Outstanding Contribution to Campaign Consulting"

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Mr. Bailey or his counsel, make a monetary contribution to the preparation or submission of this brief.

[2] For example, Mr. Bailey has consulted on successful campaigns for, among others, Governors Kean (NJ), Bond (MO), Bowen (IN), Orr (IN), Thompson (IL), Milliken (MI), Rhodes (OH), Ray (IA), Snelling (VT), Thornburgh (PA), Alexander (TN), Clement (TX), Ashcroft (MO), Kean (NJ), Cahill (NJ), DuPont (DE), and Senators Brooke (MA), Mathias (MD), Schweiker (PA), Baker (TN), Bond (MO), Danforth (MO), Chafee (RI), Pressler (SD), Lugar (IN), Stafford (VT), Percy (IL).

[3] For example, Mr. Bailey has advised, among others, Handgun Control, Incorporated, Floridians Against Casinos, and League of Conservation Voters.

Award honoring political consultants who have best represented the ideals of the profession and shown concern for the consequences and impact of political campaigns on public attitudes about the American democratic process.

In 1987, Mr. Bailey co-founded *The Hotline*, a bipartisan daily online briefing that covers the media coverage of campaigns, candidates, and specific political issues raised in over 2,500 media sources nationally, including television, radio, and newspapers across the country. Its audience includes the White House, Congress, both political parties, the political consultant industry, numerous special interest groups, and a wide variety of national media outlets. *The Hotline* was sold to the National Journal in 1996. Mr. Bailey continues as a Senior Advisor at *The Hotline*.

From 2001 through the 2004 election, Mr. Bailey was the president of Freedom's Answer, a non-partisan voter turnout program he co-founded with Mike McCurry, former Press Secretary to President Clinton. Their purpose in founding Freedom's Answer was to counteract declining voter turnout, particularly among young people, which Mr. Bailey concludes has resulted in part from the increase and importance of soft money in campaigns, thereby divesting local citizens' networks of their power. In 2002, the program helped create the largest voter turnout ever in a non-presidential year (both nationally and in 27 different states). In 2004, it contributed to an astounding increase of 17 million voters above the 2000 presidential turnout.

The integrity of the election process is extremely important to Mr. Bailey both professionally and as a citizen. He has a deep and long standing interest in

restoring voter confidence in our electoral system and lectures on the subject frequently. In *McConnell v. FEC*, he submitted a sworn affidavit, which was cited by both the District Court, 251 F. Supp. 2d 176, 305 (Henderson, J.), 528-31, 534, 560-61 (Kollar-Kotelly, J.) (D.D.C. 2003), and by this Court, 540 U.S. 90, 193 n.77 (2003), in their decisions upholding the bright-line prohibition against using corporate or union treasury funds to pay for "electioneering communications" aired in specified time periods immediately preceding general and primary elections.

SUMMARY OF THE ARGUMENT

Advertisements aired in the time frame immediately preceding an election that mention a clearly identified candidate by name will undoubtedly influence voting decisions regardless of whether the advertisement makes a direct appeal for voter support or opposition. Every competent campaign consultant, issue advocacy group, or other entity involved in the political process is cognizant of this undeniable fact and design their advertising approaches accordingly.

The Bipartisan Campaign Reform Act ("BCRA") prohibits the use of soft money to finance advertisements that clearly mention a candidate in the sixty days preceding the general election (and thirty days preceding a primary election) because, irrespective of the purpose of the ad or the intent of the organization or individual sponsoring the ad, such ads will unavoidably influence voting decisions in the election. Of course, an organization or individual may use soft money to broadcast electioneering advertisements outside the 30/60 day time periods

defined by BCRA, or to broadcast true issue advertisements (that do not refer to a candidate) in the time immediately preceding an election. The purpose of these BCRA provisions is to eliminate the unlimited expenditures of soft money on sham "issue ads" that are functionally equivalent to ads expressly advocating for or against a particular candidate's election.

Wisconsin Right To Life ("WRTL") is essentially seeking to overrule a major tenet of this Court's decision in *McConnell* by creating an exception to BCRA's bright-line prohibition—an exception that would operate to subsume the rule. WRTL claims that its ads are true issue ads that are simply one part of its "grassroots efforts" to affect pending legislative activities. According to WRTL, the constitutionality of an advertisement would essentially hinge on the purpose of the advertisement and the intent of the party broadcasting it. Determining the purpose and intent behind a particular ad will be a virtually impossible task for district courts. It will lead to arbitrary and non-uniform results regarding which advertisements are permissible under BCRA based on the subjectivity of a particular judge looking at the context of political ads and attempting to divine the purpose and intent of the party in running such an ad. Moreover, it is well known in the political campaign world that clearly identifying a known candidate in an ad aired right before an election will impact the electorate in regard to that candidate, and that a competent political consultant can design an effective issue ad or grassroots lobbying effort without identifying a candidate. Accordingly, it should be presumed that the true purpose or intent (and unavoidable result) of any ad aired right before an election that clearly identifies a candidate for office is to influence the election.

ARGUMENT

I. "ISSUE" OR "GRASSROOTS LOBBYING" ADVERTISEMENTS AIRING IMMEDIATELY PRIOR TO AN ELECTION WHICH IDENTIFY A CANDIDATE WILL UNAVOIDABLY INFLUENCE THAT CANDIDATE'S ELECTION.

In contrast to commercial transactions for which advertising is run, nearly all political "sales" take place on a single day—election day. The context for voters' decisions is created by what happens leading up to election day. Aggressive political campaigns always seek to create the most favorable context in which voters are asked to make their decisions, based on the goals of the group sponsoring the advertisement.

The quintessential purpose of a political consultant's role in designing an advertising campaign for a specific candidate is to create a cumulative, positive general impression of the candidate and provide a favorable context in which the voters can make a decision about that candidate. Broadcast advertisements about candidates are short in duration and the image sought cannot be achieved in only one or two ads. However, over time, a campaign consultant will attempt to define a candidate through a combination of style, image, and issues. Each advertisement that airs in support of a candidate in the months leading up to an election is intended to give voters a "feel" for the candidate. Arguably the most important voters—the "swing" voters that will ultimately decide the outcome of the election—rarely vote for a candidate based solely or even significantly on substantive positions that candidate has on the issues. Rather, these voters will support a candidate if they perceive that the candidate is likeable and shares similar values to them. A campaign consultant

will often use a substantive issue simply as a vehicle to help persuade targeted voters that the candidate shares their values, and to make the voters comfortable with the candidate. Thus, so-called issue ads that mention a candidate by name, whether in a positive or negative context, will undoubtedly influence the election because such ads are merely another method of providing voters with a feel for the candidate.

Prior to BCRA, so-called issue ads financed by soft money were an integral part of election campaigns, and they were often part of a concerted joint effort and overall plan between advocacy groups and the candidate. Competent political consultants know that true issue ads run in the time period immediately preceding the election are largely ineffective at actually raising voter awareness of, or interest in, a particular issue. In the time period preceding the election, true issue ads are likely to be drowned out and overwhelmed by the large volume of various political ads seeking to influence the election. Issue ads run during this time that mention a candidate's name become inexorably intertwined with the campaign itself, augmenting voters' overall perception of candidates by providing additional context in which to view the candidate.

A true issue ad campaign is most effective when it is aired outside of the time period immediately before an election, when its message will not be distorted or overwhelmed by the prevalence of candidate campaign ads. By contrast, an electioneering ad—even one purportedly about an issue but that refers to a candidate—is designed as part of a campaign package to subtly influence a voter to reach certain conclusions about the candidate while giving the voter the impression he came to that conclusion entirely independent of political propaganda. An issue ad

that airs in the time immediately preceding an election that implores a voter to "contact" or "tell" a candidate about one's opposition to a certain policy will unavoidably affect that candidate's election. During the election time period, the implicit message to the voter is that one way to change the policy would be to remove that candidate from office on election day. Conversely, an issue ad which airs during the pre-election period and implores a voter to contact or tell a candidate about one's support for a particular policy, implicitly suggests that one way to continue that policy is to vote for the referenced candidate.

II. "GRASSROOTS LOBBYING ADS" AIRING IMMEDIATELY PRIOR TO AN ELECTION WHICH REFERENCE A CANDIDATE BY NAME ARE, IN REALITY, "ELECTIONEERING ADS."

Context and timing will ordinarily determine whether an ad is a true issue ad or an electioneering ad in disguise.[4] While an ad that refers to a candidate may have an effect as an issue ad a year away from an election, that same ad will impact the viewer as an electioneering ad when it is aired right before an election. In the midst of swirling campaign activity, the primary impact of an ad that mentions a candidate's name will be as an electioneering ad.

---

[4] WRTL's argument that "Grassroots lobbying ads . . . have nothing to do with elections" defies decades of actual campaign realities. Similarly, its argument that the Court should distinguish a grassroots lobbying ad from an electioneering ad based on an examination of "the text of the ads themselves" and "not external factors" is a head-in-the-sand approach that ignores the realities of sophisticated, modern-day campaign techniques. (Br. of Appellant at 25.) The context and environment in which an ad airs is an important consideration in designing the ad and how the ad will be perceived by the viewer.

In short, the audience is simply unlikely to distinguish between the issue in the ad as opposed to the more prevalent election activity when the so-called issue ad mentions a specific candidate's name.

Competent interest and advocacy groups are fully cognizant of this dynamic and would only run a so-called issue ad or grassroots lobbying ad with full knowledge that it is the functional equivalent of electioneering. As Judge Kollar-Kotelly found and detailed extensively in her findings of fact in *McConnell*, advocacy and interest groups aired many more purported issue ads in the time period immediately preceding an election, and those ostensible issue ads were much more likely to mention a candidate by name. *See* Mem. Op. of Kollar-Kotelly, J., 251 F. Supp. 2d at 561-63.

A particularly compelling example is the Citizens for Better Medicare ("CBM") campaign of "issue ads" aired in the year preceding the 2000 election:

> During the final three weeks before the 2000 federal election, CBM aired 6,010 spots that mentioned a candidate and only eight spots that did not mention a candidate. . . . From January 1 through September 4, 2000, CBM ran 23,867 television spots, *none* of which mentioned a candidate.

Id. (citing Expert Report of Kenneth M. Goldstein) (emphasis in original). This evidence confirms what every competent campaign consultant already knows: ads that mention a candidate by name in the time period immediately preceding an election are intended to influence, and unavoidably will influence, that election. It does not

matter that they are labeled as issue ads or grassroots lobbying ads.

Judge Koller-Kotelly's opinion also provides an excellent illustration of a facially innocuous issue ad that is undeniably an electioneering ad when placed in the context of an election timeframe using a candidate's name. In her opinion, Judge Kollar-Kotelly quoted at length from a speech given by Tanya K. Metaska, former chair of the National Rifle Association Political Victory fund. Ms. Metaska said:

> We engaged in issue advocacy in many locations around the country. Take Bloomington, Indiana for example. Billboards in that city read,
>
> 'Congressman Hostettler is right.'
>
> 'Gun laws don't take criminals off Bloomington's streets.'
>
> 'Call 334-1111 and thank him for fighting crime by getting tough on criminals.'
>
> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did. *When we're three months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them.*

Id. at 537 (emphasis added). Ms. Metaska's view was entirely correct and reflects a sophisticated and effective, albeit subtle and indirect, approach to campaigning. Moreover, her statements also apply to apparent grassroots lobbying ads.

Regarding the WRTL ads at issue in this litigation, there is no practical difference, in the context of an election, between asking the audience to "contact" Senator Feingold regarding a "negative" issue about which his position is widely known, or to "vote against" him, at least in part because of it. It is actually more effective in many cases to use indirect words such as "contact" instead of direct appeals such as "vote for" or "vote against" because often voters will respond more favorably to a political message employing subtlety.

III. WRTL'S FILIBUSTER ISSUE ADS CLEARLY WERE INTENDED TO INFLUENCE, AND UNDENIABLY WOULD HAVE INFLUENCED, THE ELECTION HAD THEY BEEN AIRED AT THE INTENDED TIME.

WRTL's ads, viewed in the context of the timeframe they were intended to air, appear to have been designed to portray Senator Feingold in a negative light for the purpose of influencing the outcome of the election for which he was campaigning. The ads disparage a "group of senators" for blocking qualified candidates from serving as judges, and using politics to cause "gridlock and back up some of our courts to a state of emergency." The ads then specifically urge voters to contact Senators Feingold and Kohl and tell them to oppose the filibuster. The logical and unavoidable implication of the ads is that Senator Feingold (the only Senator mentioned who was up for reelection) supports the filibuster, and thinks that "politics" are more important than saving courts from a "state of emergency" or allowing qualified candidates to serve in the federal judiciary. Indeed, there would be no reason to tell

voters to contact Feingold and Kohl urging them to oppose the filibuster if they were already opposed to it.[5]

The three WRTL ads,[6] viewed in context with WRTL's explicit advocacy against Senator Feingold, and in light of their timing, seem obviously intended to influence the election. WRTL, Senator Feingold's Republican opponents, and the Wisconsin Republican Party had criticized Feingold for his support of the judicial filibusters and had made it a significant campaign issue. *See generally* R. at 26:1-2[7] (Dist. Ct. Mem. Op. & Order); R. at 18, Exs. 15-16, 18, 20-25 (Def. FEC's Mem. in Opp'n to Pl.'s Mot. for Preliminary Injunction, Exs. 15-16, 18, 20-25.); R. at 41, Attachment 1:3-9 (Br. of Senator John McCain et al. as *amici curiae* at 3-9.). Specifically, WRTL had released press statements critical of Senators Feingold and Kohl on July 14, and July 21, 2004. R. at 18, Exs. 24-25.

In its July 21 press release, WRTL stated that "the Senate, with the assistance of Senators Kohl and Feingold, has voted to continue its unprecedented filibuster of judicial nominees." In its July 14 press release, WRTL noted that it had "grave concerns" that Senators Feingold and Kohl had "voted 16 out of 16 times to filibuster judicial candidates." That same press release also noted that

---

[5] The fact that the proposed ads deal with both a candidate (Feingold) and a non-candidate (Kohl) equally and did not single out the candidate is of no consequence in terms of the implicit message communicated to voters, i.e., express your displeasure and disregard by complaining to Kohl and by voting against Feingold.

[6] Transcript copies of the WRTL ads are attached hereto in the Appendix.

[7] References to the Record are to the docket number assigned to each document, followed by the internal attachment number, exhibit number, or page number as appropriate.

Miguel Estrada had to withdraw his nomination after two years of having it filibustered. When WRTL's proposed ads are viewed in the context of WRTL's plan to air them right before Senator Feingold's election, along with WRTL's own press releases, website, and negative comments, and campaigning by the Republican Party and Senator Feingold's opponents, the only logical conclusion is that WRTL intended to influence the election with its proposed ads, not merely to conduct grassroots lobbying.

Though WRTL criticized Senators Feingold and Kohl for two years of filibusters, and lamented that one "well-qualified" judge had already had to withdraw his nomination, it did not start to run its so-called grassroots lobbying ads until right before the upcoming election. Pre-BRCA, this pre-election period was consistently the time when most "issue ads" financed with soft money were aired in a thinly disguised attempt to influence the election. By WRTL's own admission, the filibuster issue was a long-standing one. (Br. of Appellant at 34). If WRTL had truly wanted to run effective issue ads, it would have been best, as every competent campaign consultant knows, to run them long before the election—or even after the election, when the clamor of competing campaign messages would have died down. Tellingly, WRTL followed the historical pattern of attempting to run so-called issue ads that mention a candidate's name just prior to the election. As Judge Kollar-Kotelly explained in great detail in her findings of fact in *McConnell*, advocacy groups adopt this approach primarily to influence the election, not to actually raise awareness of a particular issue.

Interestingly, WRTL's ads provided no phone number, URL, address, or other contact information allowing listeners or viewers to actually contact Senators Feingold

and Kohl, as WRTL encourages. Instead, the ad directs listeners to WRTL's own website where, it says, contact information for Feingold could be found. But no information necessary to contact Feingold is provided by the ad itself. It is a further indication that the purpose of WRTL was not to incite such contacts at all, but rather to impact voting in the upcoming election. Indeed, the ad directed viewers and listeners to WRTL's website, which, through its e-alerts, was explicitly critical of Senator Feingold's position on filibusters. From a campaign consultant's point of view, WRTL's ads (airing in the heat of an election campaign) telling voters to contact Senators Feingold and Kohl would have been ineffective for the purpose of influencing the filibuster fight in Congress.[8] The ads, however, would undoubtedly have been effective as electioneering ads, implicitly portraying Senator Feingold as "unfair," and providing a negative general context in which voters would view him when they cast their ballots.

---

[8] WRTL incorrectly claims that it was necessary that it run ads in the time period prohibited by BCRA because "an unprecedented issue of vital national importance" was "coming to a head" at the end of the Congressional Session. (Br. of Appellant at 34.) WRTL did not air its "Wedding" ad until July 26, 2004, which was days *after* several judicial filibusters had already happened, *Id.* at 3. Most importantly, the Senate had already commenced its summer recess on *July 22, 2004*, and did not return until September 7, staying in session until October 11. (Congress' schedule is a matter of public record, and is available at http://thomas.loc.gov/home/ds/s1082.html.) The only logical conclusion that can be drawn from these facts is that WRTL intended to use Senator Feingold's past filibusters of judicial nominees to create a negative context for voters interested in his candidacy. WRTL's advertising strategy is inconsistent with an advocacy group that truly wished to engage in "grassroots lobbying." If that was WRTL's actual intent, any competent consultant would have run issue ads in the time leading up to the July filibusters, when the message would not have been obfuscated by the overabundance of campaign and electioneering ads.

IV. IF WRTL'S TYPE OF "GRASSROOTS LOBBYING" ADS ARE ALLOWED TO BE AIRED AS LEGITIMATE ISSUE ADS, THE EFFECTIVENESS OF BCRA WILL BE SERIOUSLY UNDERMINED.

BCRA was designed to avoid the sham of electioneering ads masquerading as issue advertisements. In *McConnell*, the Court concluded:

> Indeed, the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted.

540 U.S. at 193 (referencing Decl. of Douglas L. Bailey, *quoted in* 251 F. Supp. 2d at 305 (Henderson, J.)) (internal citations omitted). The so-called grassroots lobbying advertising exception that WRTL seeks in this case would be the functional equivalent of the "magic words" express advocacy/issue advocacy distinction drawn by the Court in *Buckley v. Valeo*, 424 U.S. 1, 43 (1976). In other words, WRTL's proposed exception would seriously undermine BCRA's prohibition on the use of soft money to finance electioneering ads immediately preceding an election.

Competent and creative political and media consultancy professionals could and would readily use WRTL's proposed grassroots lobbying issue ads exception to design ostensible issue ads that will have a profound and direct

impact on candidate elections. There are and always will be hot-button political issues before Congress right before any election that could be used as a pretext for airing supposed issue ads within the immediate pre-election time frame of BCRA. If the Court adopts WRTL's proposed grassroots lobbying issue ads exception, political consultants can and will design ads to influence voter behavior by portraying an issue (and/or politicians supporting that issue) in a positive or negative light, and then asking the audience to contact the incumbent politician to oppose or support that legislation, initiative or measure.

Examine, for example, the pertinent text of WRTL's proposed "Loan" ad, one of the radio ads at issue in this case.

Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates are not getting the chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org.

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

While WRTL claims that its "Loan" ad is a legitimate attempt to conduct grassroots lobbying on the issue of filibustering, it is important to note that there is no contact information for Feingold (who was up for re-election) or for Senator Kohl (who was not). Under WRTL's proposed exception to BCRA, campaign consultants will be able to easily design grassroots lobbying ads that are much more vitriolic, insidious, and emotive than the ads at issue in this case. While the ads will be grassroots lobbying ads in name, they will be electioneering ads in reality and effect. Political consultants, advocacy groups, and others parties designing ads will develop ads that will render the grassroots lobbying ads/sham issue ads distinction as meaningless as the former issue advocacy/express advocacy distinction. For example, under WRTL's notion of issue advertising nothing would stop it from modifying the above ad to read as follows:

> Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators *tied to a radical pro-abortion philosophy*[9] is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates are not getting the chance to serve, because *the Senators do not have a modicum of respect for human life.*
>
> The Senators are putting politics ahead of democracy and fairness, causing gridlock and backing up some of our courts to a state of emergency.

---

[9] The italicized portions of this modified ad quote language from a WRTL press release characterizing Senator Feingold after he voted against Unborn Victims of Violence Act. R. at 18, Ex. 20.

> Contact Senators Feingold and Kohl and tell them to make sure that these un-American tactics stop and to vote to end the filibuster.
>
> Visit: BeFair.org.
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Similarly, a pro-choice group such as Planned Parenthood could design an inflammatory and diametrically opposed ad that would fit WRTL's grassroots lobbying exception. For example:

> Right now, the Senate is trying to push through a group of radically right-wing judges to serve on the Federal Courts of Appeal. These judges want to invade your right to decide if and when you will have a family, and insert themselves into women's reproductive choices and control what choices women make affecting their bodies. These judges have made it clear that they will take away a woman's right to choose.
>
> The only thing standing between you and your right to choose is a brave group of Senators who refuse to confirm these judges who will not respect your existing rights.
>
> But the political pressure is mounting. Call Senators Feingold and Kohl and tell them to oppose these radical judicial confirmations.
>
> Paid for by Planned Parenthood of Wisconsin, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

These two hypothetical, yet conceivably allowable, ads have a clear political message that will influence the electorate if they are aired immediately before an election (even with the required disclaimer that the ads are not authorized by any candidate). The unavoidable result is that the ads would necessarily become a part of the election campaign milieu, and would serve to persuade voters how to cast their ballots. In reality and effect, grassroots lobbying ads specifically mentioning candidates and aired within the pre-election time period are exactly what pre-BCRA issue ads—like the National Rifle Association billboards example, *supra*—are; they are the functional equivalent of electioneering ads.

WRTL's claim that "grassroots lobbying ads" do not raise the same concerns as sham issue ads simply rings hollow. In fact, the standard WRTL proposes in order to determine if ads should be considered grassroots lobbying ads is as open to abuse and subversion as the Court's "express advocacy" interpretation of the Federal Election Campaign Act of 1971. WRTL proposes that the Internal Revenue Code definition of grassroots lobbying communication should be applied. (Br. of Appellant at 21.) That section sets forth three required elements. A "grass roots lobbying communication" must (1) refer to specific legislation, (2) reflect a view on such legislation, and (3) encourage the recipient to take some action with respect to such legislation. 26 U.S.C. § 56.4911-2(b)(2)(i)-(ii).

It is important to note that reference to an identified candidate is not necessary to satisfy the three requirements for a grassroots lobbying ad under the IRS definition.

Moreover, this definition of "grass roots lobbying communication" is extremely broad and, if adopted, will allow political consultants to easily create electioneering ads masquerading as grassroots lobbying ads. Not only would the above hypothetical ads meet this definition, but ads with much more inflammatory language on topics such as the war on terror, military appropriations, and immigration would also qualify as grassroots lobbying ads. If the Court were to create the exemption WRTL seeks in this case, a new species of sham grassroots lobbying ads would simply replace the sham issue ads that created the soft money loophole that Congress closed by enacting BCRA, the provisions of which were upheld by this Court. At any given time, there is a vast amount of legislation under consideration by each House of Congress and significantly more being considered by various committees. Should WRTL's position be allowed to stand, political consultants will be able to use soft money to conduct sham grassroots lobbying on a virtually unlimited range of issues contemporaneously under consideration at some point in the legislative process. It will not matter how contentious a piece of legislation is, or how likely or unlikely it is for a given measure to pass, to fail, or even to come up for consideration.

The only alternative to opening the political advertising arena and BCRA itself up to widespread abuse is to ask the Federal Election Commission and District Courts to try to divine on an individual basis for every single ad the true purpose of the ad or the true intent behind a given ad's sponsors. Unfortunately, as detailed in Section II, *supra*, this is an impossible and inherently unreliable task. What is reliable, however, is the conclusion that any ad will unavoidably have an effect on an election when it is (1) aired in the

immediately pre-election period and (2) refers to a clearly identified candidate who is running in that election. Consequently, the only logical conclusion is that grassroots lobbying ads that air in the time period immediately preceding an election and that specifically mention a candidate by name are deemed to be intended to influence the election, are the functional equivalent of electioneering ads, and therefore are and should appropriately be subject to the BCRA rules that apply to electioneering communications.

CONCLUSION

BCRA's reforms were designed principally to restore the integrity of the Federal Election Campaign Act, to address the fundamental concerns expressed by this Court in *Buckley v. Valeo* regarding corruption and the appearance of corruption, and to stop the massive use of soft money to circumvent the constitutionally consistent and legislatively approved limitations on campaign contributions. BCRA adopted a "bright-line" test to determine the class of communications subject to campaign finance rules. This Court in *McConnell v. FEC*, upheld this test and should do so again by affirming the decision of the Court below.

Respectfully submitted,

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APPENDIX

TV Script

Client: Wisconsin Right to Life
Title: "Waiting" :30
Job#: WRL-8136
Date: July 14, 2004

VIDEO

We see vignettes of a middle-aged man being as productive as possible while his professional life is in limbo:

He reads the morning paper
He polishes his shoes
He checks for mail, which hasn't arrived
He scans through his Rolodex
He reads his Palm Pilot manual
He pays bills

SUPER:
www.BeFair.org

4-SECOND DISCLAIMER (4% or 20 scan lines):
Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising, not authorized by any candidate or candidate's committee.

AUDIO

VO:
There are a lot of judicial nominees out there who can't go to work.

Their careers are put on hold because a group of U.S. Senators is filibustering – blocking qualified nominees from a simple "yes" or "no" vote.

It's politics at work and it's causing gridlock.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

WRL REPRESENTATIVE VO:
Wisconsin Right to Life is responsible for the content of this advertising.

Radio Script

Client: Wisconsin Right to Life
Title: "Wedding" :60
Job#: WRL-8136
Date: July 15, 2004

AUDIO

We hear church bells up and under . . .

TALENT

PASTOR: And who gives this woman to be married to this man?

BRIDE'S FATHER (rambling):
Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .

VO:
Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial

nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.

Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

BRIDE'S FATHER (rambling): Then you get your joint compound and your joint tape and put the tape up over . . .

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org. That's BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Radio Script

Client: Wisconsin Right to Life
Title: "Loan" :60
Job#: WRL-8136
Date: July 14, 2004

AUDIO

TALENT

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and, well . . .

COUPLE: Yes, yes . . . we're listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River in Waupaca . . .

VO: Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

NOV 15 2005

No. 04-1581

IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS, THE CATO INSTITUTE, THE GOLDWATER INSTITUTE, THE INSTITUTE FOR JUSTICE, THE REASON FOUNDATION, AND THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANTS

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November 14, 2005

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional protections for political activity – including speech, assembly,

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

and petitioning – relating to governmental policies and conduct, which lies at the very heart of the First Amendment.

The Goldwater Institute was founded in 1988 by a small group of entrepreneurial Arizonans with the blessing of Sen. Barry Goldwater. Through research and education, the Goldwater Institute works to broaden the parameters of policy discussions to allow consideration of policies consistent with the founding principles of free societies. Central to the mission of the Goldwater Institute's Center for Constitutional Government is studying the constitutional implications of campaign finance reform. The issues presented in this case are of interest to the Goldwater Institute because of the critical role non-profit organizations play in the dissemination of core political speech. The Goldwater Institute fully supports their right to communicate views about candidates and policy issues at any time, especially, as this case illustrates, in the days leading up to an election..

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between freedom of speech, assembly, and petitioning on the one hand and repressive government mandates on the other, and thus touches the very core of IJ's mission and ideals.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicat-

ing libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech, assembly, and petitioning, and contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the protection of core political speech and association lies at the heart of the First Amendment. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several other cases of constitutional import, including *Elk Grove Unified School District* v. *Newdow*, 524 U.S. 1 (2004); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

STATEMENT

The district court dismissed WRTL's challenge because it incorrectly believed that this Court's decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), "leaves no room for" the challenge presented here. Jurisdictional Statement Appendix (J.S. App.) 2a. Incorporating its reasoning from its denial of a preliminary injunction, the district court concluded that the *McConnell* decision foreclosed *all* as-applied challenges to BCRA's restrictions on "electioneering communications." J.S. App. 3a, 7a-8a. *Amici* here will leave discussion of that error (addressed in the first Question Presented) in the capable hands of Appellants and others.

As additional grounds for rejecting WRTL's claims, the district court opined that "WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating" – *i.e.*, broadcast advertisements identifying a federal candidate during the run-up to an election – on the theory that "such broadcast advertisements 'will *often* convey [a] message of support or opposition' regarding candidates." J.S. App. 8a-9a (citations omitted). The district court also downplayed the First Amendment interests at stake, arguing that "BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs)" or use non-broadcast media to disseminate their message. *Id.* 9a-10a & n.1 (footnote omitted). The court cited *McConnell* and *FEC* v. *Beaumont*, 539 U.S. 146, 162-63 (2003), for the supposed adequacy of "the PAC option" in minimizing the First Amendment harm to WRTL.

SUMMARY OF ARGUMENT

1. When this Court first created the contribution and express advocacy exceptions to protections for political speech, it recognized the questionable nature of the enterprise and strove to limit it, finding only in the most narrow of circum-

stances that a governmental interest in preventing corruption could trump protected speech. The government has since inverted the process, looking first for any proximity to an election as the preeminent question, and second to whether a speech interest exists. Speech jurisprudence is sliding down a slippery slope; prophylaxis is replacing narrow tailoring. It seems that it is now the regulation of speech, not its protection, that has its "fullest and most urgent application" where speech has any attenuated relation to an election.

Proximity to an election, however, is neither a sufficient reason to stifle grass-roots lobbying ninety days a year, nor reason to prevent grass-roots lobbying ("GRL") over certain media. The government presumes incorrectly that there is no such thing as genuine GRL close to an election or, worse, that the possibility that such lobbying could be confused for electioneering is a sufficient reason for banishing it to other parts of the year or to less effective media. Even if this Court is unprepared to reverse its three-decade slide into speech regulation and correct the errors of its earlier decisions, the least it should do is stop extending those errors, recognize some outer bounds of "electioneering," and recognize a legitimate as-applied limitation on BCRA's reach into GRL.

2. Few activities so perfectly combine the essential elements of First Amendment concern as do the exercise of rights to assemble and petition the government for a redress of grievances. GRL is its purest form; the peaceful call for government action made by the People themselves. That this lobbying occurs near an election, lists Senators by name, or is transmitted over effective media are no bases for failing to protect it or distinguish it from electioneering. In this case, the Senate was in session and judicial filibusters were imminent. Generic criticism of the government falls far short of the effective association and petition enshrined in our Constitution.

Furthermore, the evolution of other doctrines has magnified the importance of GRL to democracy from a structural

perspective, as the Court defers increasingly to the political branches. The Court's very advice to citizens – to raise issues with the legislature – is what makes GRL all the more important, particularly as other provisions of federal campaign law have cluttered many avenues for citizen participation in the last three decades. If popular sovereignty is to remain anything but a pretext for governmental authority, GRL must be distinguished meaningfully from electioneering and provided adequate Constitutional protection.

3. Ever since *Buckley* established corruption and its appearance as the compelling government interest supporting campaign finance reform restrictions, that interest has continually been extended to more attenuated situations having less and less to do with corruption or its appearance. In the process, greater swaths of core political speech have been restricted. But the "corruption" interest identified in *Buckley* has serious conceptual flaws, and its extension to concerns such as "undue influence" are deeply troubling and nowhere near as compelling.

Whether or not this Court is willing to reconsider its holdings finding that "corruption" and the appearance of corruption are compelling interests in the abstract, it should at least recognize that such holdings are based on a highly contentious conception of the political process in a democracy and should strive to limit the degree to which it expands such holdings to more attenuated situations.

The government's interest in regulating the GRL at issue in this case is even further attenuated and not at all compelling. Such GRL is not remotely a sham, threatens no appearance of corruption, and whatever influence it might generate relative to an election is not even remotely undue, but rather would be the product of the amount of petitioning support the ads generate from the public. In short, while some electioneering communication may pose the dangers identified in McConnell, the GRL at issue here poses no genuine concern

4. In the case of GRL, the value of the First Amendment activity is high, the government's interest is misconceived in principle and attenuated in application, and the burden imposed by BCRA is substantial. BCRA would regulate precisely that GRL which is most likely to be effective at reaching an audience, inducing assembly and petition, and gaining the attention of the officials being petitioned. Indeed, that is exactly why BCRA regulates broadcast communications in the run-up to an election – because they are most likely to have an influence on the public. The government simply cannot have it both ways – regulating speech because of the effectiveness of its communication and then denying that it imposes a substantial burden on such speech. The non-broadcast media left open by BCRA simply are not effective or adequate alternatives, which is why they were left open to begin with. And the so-called PAC option actually places substantial hurdles in the path of effective GRL, particularly for new or small organizations.

ARGUMENT

The progressive extension of the excuses for regulating core political speech that began with *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and peaked in *McConnell* is a paradigm example of the proverbial slippery. What began as narrow exceptions to the First Amendment's jealous protection of political speech are now the unchallenged starting points for attenuated analogies used to support ever-expanding restrictions on core First Amendment activities.

With such growing restrictions on core First Amendment activity, we have gained speed down the slope of a mountain of questionable logic and faulty premises, removing all First Amendment bulwarks that might stop us. Where narrow tailoring was once the rule, prophylaxis is now the order of the day. Where regulation based on the communicative impact of speech was once the greatest First Amendment sin, it is now precisely such impact – speech's ability to influence voters,

and hence elections – that provides the supposed government interest justifying regulation. Long forgotten is the once obvious statement by an earlier Court that the First Amendment has its "fullest and most urgent application" in the context of elections. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971). Such notions now have been replaced by a paradigm demonizing any speech that might possibly *influence* an election, as if influencing elections through speech were somehow a bad thing. It now seems that it is the regulation of speech, not its protection, that has its "fullest and most urgent application" in the context of speech having even an attenuated relation to an election.

Essential First Amendment principles are now so badly inverted that the government actually quotes portions of *Buckley* for precisely the opposite of their original purpose. When it first created the express advocacy exception to protections for political speech, this Court seemed to recognize the questionable nature of its enterprise and strove to limit it by explaining why a broader exception would be inappropriate: "[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. Now almost thirty years hence, the government quotes that same passage as its justification for expanding regulation to grass-roots lobbying, noting that "[m]ost electoral advertisements discuss issues of public importance." FEC Motion to Dismiss Appeal at 19 n. 5. What was once an essential justification limiting the scope of restrictions on core speech is now a purported justification for expanding them.

It is time for this Court to step back and survey the destruction from this downhill slide – the abandonment of the most fundamental conceptions of representative democracy, the disregard for the letter and principles of the First Amendment, and the abdication of the judicial duty to defend and

enforce the Constitution most vigorously when incumbent office-holders of the elected branches have every incentive to do it violence.

Hopefully such reflection on the end result of the three-decade slide into regulating political speech will give this Court pause. Even if this Court is unprepared to reverse that slide and correct the errors of its earlier decisions, the very least it should do is stop extending those errors, starting with the recognition of as-applied limitations on BCRA. This case provides just such an opportunity to stop the death-spiral of logic that flows from the flawed premises that led to the *McConnell* decision.

I. GRASS-ROOTS LOBBYING IS CORE POLITICAL SPEECH, ASSEMBLY, AND PETITIONING ACTIVITY THAT IS ESSENTIAL TO VINDICATING THE PEOPLE'S PREEMINENT ROLE IN OUR CONSTITUTIONAL SYSTEM.

There can be no more certain axiom in constitutional law than the proposition that the essential core of the First Amendment is the protection of free and unfettered political speech. Discussion about and criticism of the government in general, our elected representatives in particular, and the various policies or actions being adopted and considered by them are both the essence of and the fundamental predicates for political participation by the People – the ultimate sovereign within our constitutional structure.

Few activities so perfectly combine the essential elements of concern to the First Amendment as does the exercise of the right to assemble and petition the government for a redress of grievances. It involves the discussion and exchange of ideas regarding government conduct among the people being assembled; it involves the communication of those ideas to the government and the individual members thereof whose job it is to represent us; and it involves the peaceful call for government action made by the very source of all authority in our constitutional system, the People. If the First Amendment has

any remaining meaning as a binding restriction on Congress, surely it must mean that such activity cannot be restricted or burdened for anything less than the most compelling and immediate reasons, and even then to the least extent possible.

The activity under review in this case – grass-roots lobbying ("GRL") – is among the purest examples of such fundamental First Amendment activity. The advertisements in question directly address Senate filibusters of judicial nominees, a contentious public policy issue that was and will continue to be a major source of political conflict within Congress and throughout the country. J.S. App. 13a-17a. The advertisements were directed to the ultimate source of legitimate government authority, the People themselves, and indirectly towards the relevant agents of the People, the Senators considering whether to filibuster. The advertisements likewise contained a mixture of information (informing the people that filibusters had occurred and were threatened), argument (analogizing filibusters to various forms of obstruction, delay, and waste of resources), opinion (expressing the view that filibusters are bad), a call to action (asking people to contact their specific Senators and petition them to oppose the filibuster), and a means for many people to easily assemble to accomplish that action (a link to a website facilitating the petitioning of appropriate Senators).

In short, GRL in general and the advertisements here in particular represent virtually "perfect storms" of First Amendment activity, constituting speech, assembly, and petitioning, and facilitating further such activity by the public.

As if that were not enough, the subset of GRL at issue in this case – broadcast communications in close proximity to an election that name specific Senators, one of whom was up for reelection, and that are targeted to those Senators' constituents – constitutes the most meaningful, effective, and essential form of GRL one can imagine.

First, Congress is often in session during the 60 days immediately prior to an election, and voting on issues. In this case, Congress was in session during a substantial portion of the 60 days at issue, with judicial nominees pending and filibusters in place. Issues under consideration before Congress do not go away as elections near, and the importance of GRL during that period continues unabated.

Second, the timing of the communications during the run-up to elections is a critical factor enhancing their potential effectiveness. The only time representatives feel uniquely compelled to listen to the petitions of constituents is precisely when those constituents are preparing to exercise their only genuine power over their representatives and are most likely to retain a meaningful memory of the response to such petitions. Furthermore, the immediate run-up to an election is when the public itself is most focused on the actions of their representatives and is most inclined to be receptive to information, advocacy, and calls for action. The election run-up also forces a decision-point for politicians on numerous issues, demanding that they make or adjust choices on issues in the public eye in order to make a case for their reelection. The pre-election combination of official receptiveness, public focus, and a concentrated decision node thus makes the type of GRL at issue here uniquely vital to the democratic process

Third, naming specific Senators and targeting the relevant electorate – otherwise known as the Senators' constituents – is an inherent and essential aspect of effective GRL. The very point of GRL is to influence congressional action on an issue of concern, and the only realistic means of doing so is to maximize the congruence between the would-be petitioners and the officials being petitioned. Senators and other representatives are primarily, if not exclusively, concerned with the requests and views of their own constituents. Petitions by non-constituents may not be wholly ignored, but those by the "relevant electorate," 2 U.S.C. § 434(f)(3)(2), cannot be ig-

nored without political peril, especially as an election approaches.

Specifically identifying the official to whom subsequent petitions should be addressed likewise is an integral part of any grass-roots lobbying effort. Generic criticism of government conduct without clear information and direction regarding what to do about it is but a pale shadow of effective assembly and petitioning. Identifying the relevant decision-maker and providing information regarding how to contact that decision-maker enhances the chances of subsequent petitioning activity by the target audience. The failure to identify the proper recipient of a proposed petition places the information-gathering burden on individuals, making it more difficult to assemble a large group to petition the government. Naming names thus lies at the heart of effective GRL and likewise at the heart of the First Amendment.[2]

Fourth, GRL promoted and organized through broadcast media is a singularly effective and vital form of such First Amendment activity. This Court itself once recognized that broadcast media are "indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 19. And BCRA itself highlights the importance of broadcast communications by specifically targeting them for greater restriction. The very reason broadcast communications are more heavily restricted

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[2] *See* Michael Delli Carpini & Scott Keeter, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 69-71 (1996) (citing studies demonstrating that most Americans do not know where in government responsibility lies for setting and carrying out most government policies); Stephen E. Bennett and Linda Bennett, *Out of Sight Out of Mind: Americans Limited Knowledge of Party Control of the House of Representatives 1960-84*, 35 POL. RES. Q. 67 (1992) (most Americans do not know which party controls Congress, and hence need names in order to act to properly communicate preferences); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1309 (2004) (Citing data showing that during the campaign most voters in elections cannot name a single candidate for office).

is *precisely* because they are more effective at reaching the target audience and hence "influencing" elections. What is accepted by this Court and Congress regarding the greater effectiveness of broadcast communication to influence elections necessarily requires acknowledgment of the unique effectiveness of such communications as the means for GRL to inform, encourage, and enable the public to further petition their representatives. Such broadly communicated speech is a central instrument for pulling together a broad assembly of people to petition the government for a redress of grievance.

Finally, beyond the general and particular attributes of GRL described above, the evolution of other legal doctrines and developments has magnified the importance of GRL from a structural perspective, forcing it to shoulder more of the government-checking burdens that might instead have been borne elsewhere. Such burden-shifting is a function of this Court's long-standing deference to the elected branches, its reluctance to enforce significant constitutional limits on those branches, and its expanding endorsement of restrictions on other forms of core political speech.

In numerous cases seeking to invoke constitutional checks against legislative authority, this Court has adopted a highly deferential approach, advising us that if the public does not like the way the elected branches are exercising such authority they should take it up with their legislators, not with the courts. *See, e.g.*, *Gonzalez* v. *Raich*, -- U.S. --, 125 S. Ct. 2195, 2215 (2005) (rejecting commerce clause challenge and suggesting resort to "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress"); *Munn* v. *Illinois*, 94 U.S. 113, 134 (1877) (rejecting due process challenge and stating that "[f]or protection against abuses by legislatures the people must resort to the polls, not the courts.").[3]

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[3] *See also Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985) (holding that limits on the Commerce Clause power of Con-

But that very advice to raise such issues with the legislature makes GRL all the more important because that is precisely what GRL does. GRL is now one of the few remaining checks on a Congress that has accreted power far beyond that exercised in 1789 and that, in most cases, has little to fear from the deferential constitutional scrutiny applied by the courts. If such fundamental political activity is allowed to be constrained by the very Congress toward which it is directed, then the promise of political checks as adequate substitutes for constitutional checks rings especially hollow indeed. Whether or not resort to political activity can adequately substitute for other constitutional checks, such a substitute necessarily depends on keeping political activity such as GRL as completely free as possible. First Amendment protection for GRL thus represents the type of structural check for which other democratic processes cannot adequately substitute. *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). The loss of such protection taints the remaining processes and tends to feed upon itself.

It is for such reasons, among others, that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 638 (1943). The fundamental rights to speak, assemble, and petition regarding such core matters as the conduct of the government "may not be submitted to vote[,] they depend on the outcome of no

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gress are to be enforced through the political process); *Daniel* v. *Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) (rejecting due process challenge and holding that the "forum for the correction of ill-considered legislation is a responsive legislature."); *Peik* v. *Chicago and N.W. Ry. Co.*, 94 U.S. 164, 178 (1876) (rejecting multiple constitutional challenges and noting that "If [the price limit] has been improperly fixed, the legislature, not the courts, must be appealed to for the change.").

elections," and they surely cannot be placed at the mercy of the government itself. *Id.*

While the above matters would seem axiomatic in our constitutional system, they have not been sufficient to prevent this Court from endorsing restrictions on core political speech such as express advocacy regarding candidates or on issue advocacy that might be considered the "functional equivalent" of such express advocacy. *McConnell*, 540 U.S. at 206. Such restrictions have been permitted not because that speech lay outside the core of First Amendment protection, but in spite of the central importance of such speech and based on the misguided view that speech aimed at influencing elections – which would seem to be the very reason it is considered core speech – somehow presents unique dangers that outweigh First Amendment interests. However, having excluded such election-directed speech from any genuine First Amendment protection, GRL is one of the last remaining categories of core political speech with even the potential to remain free and unfettered.

Insofar as the notion of government of the People, by the People, and for the People retains any value whatsoever in our constitutional system, there must be *some* firm First Amendment lines drawn and *some* ground upon which the government may not tread. Of the two fundamental expressions of the sovereignty of the People – advocacy regarding who to elect as our representatives and advocacy regarding what actions those representatives take while in office – the former is already heavily regulated and in no cogent sense "free." Such limitations on speech directly addressing *who* should be elected to office thus exponentially increase the value of remaining speech regarding *what* those elected officials should do while in office. The district court below would now subject this last bastion of the authority of the People to significant government regulation as well. This Court should reject that result or else risk creating a null set of the once-exalted category of *protected* core political speech.

Should that happen, the First Amendment will have lost its most essential function in our democracy and the fundamental role of the People in our system will have been rendered a pale shadow of the lofty vision expressed in the Declaration of Independence and the Constitution.

At the end of the day, this Court should start, proceed, and finish its analysis of this case with the clear and unfettered recognition that GRL embodies the very essence of activities the First Amendment protects. Such central First Amendment value inheres in all GRL. The fundamental category of GRL – speech directed to the public informing, exhorting, and facilitating the exercise of their right to assemble and petition government officials regarding pending or prospective actions by those officials – stands as one of the two crucial First Amendment pillars by which the People exercise their authority in a constitutional system deriving all of its legitimacy from the People. That pillar takes on added importance in light of this Court's allowance of substantial depredations against the other First Amendment pillar supporting the People's role in our system – the right to advocate for the election or defeat of those who would *represent* the People as their agents in government. Failure to exempt from depredation the remaining First Amendment pillar in our constitutional structure may well weaken the edifice beyond repair.

II. THE GOVERNMENT INTEREST IN RESTRICTING GRASS-ROOTS LOBBYING IS ATTENUATED AT BEST AND CERTAINLY IS NOT COMPELLING.

The sole government interest at issue in this case is the asserted but unproven *hypothesis* that GRL organized and advocated by a corporation using general treasury funds has the potential to "corrupt" political office holders who might be thankful for such efforts or to cause the appearance of such

"corruption."[4] That Congress has, *ipse dixit*, declared such hypothesis to be true would hardly seem meaningful if genuine strict scrutiny were applied but, in any event, the hypothesis is flawed both in its conception of "corruption" generally and in its application to GRL in particular.

Before turning to the flaws in applying such reasoning to GRL generally or to the ads at issue in this case, it is useful to review how far the government's asserted interest has strayed from the central concern over corruption and the appearance of corruption as articulated in *Buckley*. 424 U.S. at 25.

A. The Government Interest In Regulating Speech Has Grown More Attenuated Since *Buckley*.

Buckley involved contributions of cash in unlimited quantities directly to present and prospective officeholders. *Id.* While such money could, of course, only be used for speech and associated activities, and thus was not properly viewed as corrupt in the first place, it at least had the simplistic smell of a bribe and the Court took great pains to argue that the First Amendment value of candidate contributions was considerably less than the value of direct expenditures for political

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[4] *See* Stephen Ansolabehere and James M. Snyder, Jr., *Why Is there so Little Money in U.S. Politics*, 17 J. ECON. PERSPECTIVES 105 (2003) (examining 36 published, peer reviewed studies on effects of money in U.S. politics since 1981, and concluding, "the evidence that campaign contributions lead to substantial influence on votes is rather thin * * *. Money has little leverage because it is only a small part of the political calculation that a re-election oriented legislator makes."); Nathaniel Persily and Kelli Lammi, *Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 152 (2004) (concluding on the basis of extensive empirical research that, "Americans' 'confidence in the system of representative government' – specifically, their beliefs that government officials are not 'crooked' and that government is 'run for the benefit of all' – is, to a large extent, related to their position in society, their general tendency to trust others, their philosophy as to what government should do, and their ideological or philosophical disagreement with the policies of those in charge.")

speech. Although calling such contributions corrupt was a stretch, this Court seems committed to it so there is no point in revisiting the serious difficulties of that approach. *But see* Jaffe, McConnell *v.* FEC: *Rationing Speech to Prevent "Undue" Influence*, 2003-2004 CATO SUPREME COURT REVIEW 245, 290-296 (2004) ("*Rationing Speech*") (critiquing the corruption rationale in *Buckley* and *McConnell*).

From the starting point speculating that large contributions can cause actual or perceived corruption, this Court then analogized that coordinated expenditures for speech were comparable to direct contributions. 424 U.S. at 46-47. Of course, that analogy was far from perfect, insofar as even *coordinated* expenditures involve the speech of the third party, not merely speech by proxy, and limiting such expenditures undermines the effectiveness of such speech and free association. That step was a remarkable extension of the rational behind contribution limits, ignoring all of the diminished-speech-value arguments *Buckley* used to justify its watered-down First Amendment approach to contributions. The speech value of coordinated expenditures was considerably higher than *Buckley* had suggested for contributions, and the supposed danger (though perhaps analogous *if* a candidate exerted substantial control, as opposed to mere input, over coordinated efforts) was still less than with contributions over which the candidate exercised full control.

Buckley next looked at uncoordinated expenditures and concluded generally that such expenditures had a higher speech value and a lower danger of actual or perceived corruption and thus were worthy of protection. This Court carved out a narrow exception, however, for expenditures on express advocacy of the election or defeat of a candidate, reasoning that once again such express advocacy was sufficiently analogous to contributions and coordinated expenditures to be regulated as a means of preventing circumvention of the contribution limits. 424 U.S. at 43-44 & n. 52.

But the analogy was again far from perfect and it served to expand the range of regulation to encompass speech that had greater value and posed still less of the supposed danger of corruption than the regulated categories that had come before.[5] In fact, the narrow exception to ordinary First Amendment scrutiny had extended to the very core of political speech. Advocacy of the election or defeat of a candidate – whether express, implied, or otherwise – is a quintessential example of political speech, and whatever degree of appreciation and responsiveness generated from effective political speech seems to be the very point of having periodically elected representatives.

The saving grace in *Buckley*'s treatment of express advocacy was that this Court seemed to recognize the questionable nature of its undertaking and sought to limit the damage by acknowledging the core value of speech discussing *both* issues and candidates, though lacking the magic words of express advocacy. 424 U.S. at 42.

That purported stopping point on the slippery slope was not to last, however, and by the time this Court decided *McConnell*, *Buckley*'s initial corruption rationale had again expanded and was to be "'understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence.'" *Beaumont*, 539 U.S. at 156 (citation omitted). The expansion also included additional reasons for restricting corporate po-

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[5] In upholding the statutory restriction on expenditures "relative to a clearly identified candidate," but only after construing it to apply narrowly to the limited class of express advocacy of the magic-words variety, this Court was responding to vagueness concerns raised by the broad statutory language. But in fact the statutory language was vague only insofar as it was overly *broad*, and many of the concerns discussed by this Court involved such *overbreadth*. It was in that dual context that the Court discussed the inevitable blending of issue advocacy and the discussion of candidates as examples of speech that it thought could not be regulated consistent with the First Amendment. 424 U.S. at 42-45.

litical speech, including the supposed "special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and * * * to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace, and preventing the use of corporations "as conduits for circumvention of [valid] contribution limits" by corporate owners or employees. *Beaumont*, 539 U.S. at 155 (citations and quotation marks omitted).

In *McConnell*, this Court used that expanded palette to extend the express advocacy concept – already attenuated – to speech that contained no such advocacy but that was characterized as the "functional equivalent" of express advocacy and pejoratively called "sham" issue ads. 540 U.S. at 206. Once again, however, the analogy was far from perfect, *see* Dorie E. Apollonio and Margaret A. Carne, *Interest Groups and the Power of Magic Words*, 4 ELEC. L.J. 178 (2005), and served to expand the scope of regulated speech to include increasingly higher value speech with fewer dangers of corruption or its appearance.

It is with this continual descent into government regulation of core political speech in mind that this Court should consider the current challenge to BCRA as applied to GRL.

B. The Government Interest as Applied to GRL Is Highly Attenuated and Not Compelling.

The government now asks this Court to take the next step in its descent by retracting any effective First Amendment protection for GRL that is not remotely a "sham" and that has extensive and independent value wholly apart from any indirect effect it may have on an election. The purported government interest at stake is no longer the actuality or appearance of corruption as conceived in *Buckley*, but rather a nebulous interest in preventing "undue" influence and prophylactically blocking "circumvention" of previous restrictions. The notion of undue influence, however, is a snake pit, without

any coherent baseline of what amount or type of influence is "undue" and what influence is simply part of the ordinary democratic process. *See Rationing Speech*, 2003-2004 CATO SUPREME COURT REVIEW, at 295-96. And prophylaxis as an interest simply feeds upon itself with each new restriction spawning supposed circumvention and the need for further restrictions. But it is odd to characterize efforts to maximize First Amendment activity up to, but not crossing, the boundaries of existing restrictions as "circumvention" of those restrictions unless one wrongly assumes that virtually *any* effort to influence who gets elected and what actions they take is unacceptable. Effective political speech and association used to influence government are not means of *circumventing* restrictions on supposedly improper influence. Rather, they are the constitutionally favored alternatives for achieving desired ends *without* force, bribery, or other improper means. Multiple layers of prophylaxis simply address more and more attenuated risks of the underlying danger and at some point such risks must cease to present compelling interests.[6]

Such overly attenuated risks are precisely what are involved in the GRL context and from the particular ads at issue here.

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[6] Surely this Court must weigh the *magnitude* of a risk, not merely its abstract character, to decide whether it is a compelling justification for a particular restriction or application. *Cf. Van Orden* v. *Perry*, -- U.S. --, 125 S. Ct. 2854, 2871 (2005) (Breyer, J., concurring in the judgment) (Establishment Clause analysis a matter of "degree" in close cases; finding that a mixed message including some religious component did not establish religion). Because mixed messages in political debate may be inevitable to some extent, one should err in favor of permitting high-value speech such as GRL. Otherwise, the only way to eliminate *all* risks associated with election-related speech is to eliminate all freedom of speech, a solution that is anathema to our constitutional system. *Cf.* Federalist No. 10, THE FEDERALIST PAPERS 45-46 (Rossiter & Kesler eds. 1999) (one could eliminate faction "by destroying the liberty which is essential to its existence," but such remedy is "worse than the disease").

First, the messages in this case do not discuss the positions of the named officials regarding judicial filibusters, but rather simply ask the public to petition the Senators to oppose the filibuster. There is no indication whether such urging is for the purpose of trying to discourage a filibuster supporter, sway a fence-sitter, or bolster the resolve of a filibuster opponent. Any implicit support of or opposition to a candidate from such communications will depend largely on the candidate's response to the ensuing petitions, and the implied message of support or opposition would change (for better or worse) insofar as the candidate's position on the issue changed.

Second, the timing of broadcasts in the run-up to the election does not raise the inference that the ads are "shams." Importantly, the timing coincided with the timing of the Senate filibusters from which the relevant legislators were being asked to abstain. The issues subject to GRL do not simply stop as an election approaches, and neither should the right to engage in effective lobbying. Furthermore, the growing proximity of the election made broadcast communication more important for WRTL's legitimate GRL because that is the time when both the public and the incumbents are most attuned to the political issues being debated and are most likely to be responsive to GRL. While that undoubtedly is related to the election itself in a number of ways – enhanced publicity, proximity of an impending decision focusing attention, and, yes, concern over the electoral effects of a particular policy or action – that does not mean the ads are designed to influence the election as opposed to use the proximity of the election to influence the substantive decision to which the GRL is directed. The analogy to direct advocacy and even to "sham" issue ads such as those attacking a politician personally and then mentioning some policy issue in passing is thus considerably weaker and the government interest in regulating such speech is even more attenuated.

Third, even assuming some implied electioneering content to GRL, whether the ads in this case or even future ads that negatively identify a candidate's legislative position, at best such GRL would involve a *mixed message*, not a sham. Such mixed messages are precisely what *Buckley* referred to when limiting restrictions to express advocacy and, as a practical matter, do not pose the same risks of undue influence or gratitude.

Fourth, the notion that GRL might pose a particular danger when coming from a corporation is, at a minimum, more attenuated for a non-profit corporation, and is preposterous in the context of speech the ultimate influence of which is determined by the demonstrable support it receives from the public in the form of resulting petitions to elected officials.

Insofar as the perceived unfairness of corporate wealth being used for expenditures is premised on the notion that corporations can generate speech and influence out of proportion to the strength or support behind their ideas and hence beyond the amount of speech and influence they *ought* to have, that begs the question of what is the "proper" amount of speech and influence. Though failing in its application, *Buckley* at least correctly recognized that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

The disparagement of corporate speakers as "special interests" gives no explanation of how they might pose different harms from a corruption perspective, and whatever added influence comes from central importance such entities might give to a limited range of issues above others hardly consti-

tutes "undue" influence. People everywhere place their energies behind those things that matter most to them and they tend to have influence in proportion to the energy they invest. That is the nature of *all* interests in a democracy, "special" or otherwise. Indeed, if anything, a proliferation of relatively narrow and competing interests was a central and important assumption of the Framers and a key aspect of the checks and balances of our Constitution. Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45. The solution to the danger of faction is not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Any supposed concern with "special" interests thus misunderstands the entire problem of faction as it concerned the Founders. Far from being compelling, a desire to decrease special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52.

Finally, in the context of GRL, the danger of undue influence is limited at best because the influence of the group running the advertisement will presumably be a function of how many people actually follow their advice and petition the relevant elected official. Even accepting that such resulting activity will have an influence on an election, it is hardly *undue* in that it is directly tied to the amount of public support generated by the speech in the readily identifiable form of a petition. Unlike generic express advocacy asking people to vote, for which we are never able to determine a direct effect and hence the influence may be misperceived, here we have a direct measure of the effectiveness of the GRL and hence the actual and perceived influence of the organizer will be in direct proportion to the number of people who act on the advice given, not simply on the dollar amount spent on the ad. It is

hard to imagine a form of influence that is more closely aligned with popular support for a particular view.

III. BCRA Imposes Substantial Burdens on Grass-Roots Lobbying.

In light of the essential value of GRL and the attenuated government interest in regulating such speech, assembly, and petitioning activity, all that remains is to determine whether BCRA's electioneering communication restrictions impose a burden on GRL. The answer seems apparent: Not only does BCRA burden GRL, the burden imposed is substantial and directed precisely at the content and communicative impact of the ads in question.

First, on its face BCRA constitutes a content-based restriction expressly targeted to the communicative impact of GRL. Such restrictions are, by definition, substantial for First Amendment purposes wholly apart from their quantitative impact on the speech in question. *United States* v. *O'Brien*, 391 U.S. 367, 382 (1968) (discussing situation in which a statute aimed at suppressing communication could not be sustained).[7]

Second, the suggestion that adequate alternative channels of communication negate the First Amendment burden is misconceived as applied to the content-based restrictions at issue here. Such reasoning only makes sense in the context of neutral time-place-manner restrictions and conduct regulation that only incidentally burdened speech because many government actions can *affect* speech without in any real sense

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[7] A $1 a year tax applied only to speakers who criticize the government would entail a substantial First Amendment burden notwithstanding that it would have essentially no impact on the number of critical speakers or the amount of critical speech.

abridging the freedom of speech, and strict scrutiny in all such cases would grind government to a halt.[8]

In this case, however, BCRA's restrictions on electioneering communications are imposed precisely based on the content of the speech and for the very purpose of suppressing their communicative impact, *i.e.*, their potential for persuading voters and thereby influencing elections. In such instances the First Amendment offense is the attempt to *skew* the public debate in a direction favored by the government, not simply the reduction of speech in total. Whether the government thumb on the scale benefits or burdens particular viewpoints, particular categories of speakers, or particular targets of speech (such as incumbents), the First Amendment concern over such restrictions is the same – manipulation of the public debate by the government. *See Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message * * * pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."); *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.' * * * To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if

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[8] The imposition of ordinary income or sales taxes, for example, reduces private resources available for speech, yet such government action ordinarily does not implicate First Amendment concerns. Even restrictions related to speech in general, though not to its content or communicative impact, are common and necessary features of ordinary living. Noise ordinances and parade permit requirements, for example, may well burden speech to some extent, but without basic rules of the road it would be difficult to maintain civilized co-existence.

directed by the government.") (citation omitted). Such manipulation is a central concern of the First Amendment, and it matters not whether it operates by merely tilting the playing field or by fully suppressing a particular speaker or message. To import the reasoning of adequate alternative channels of communication into this context is thus a troubling and dangerous extension of a narrow line of cases and contributes to the accelerating downhill slide in First Amendment protections for core political speech.

Third, even assuming the importation of the alternative avenues analysis into this context, the option of simply avoiding BCRA's timing, broadcast, or candidate-identification triggers is not an *adequate* alternative given that those triggers are the very same elements of the most effective GRL. *See* Part I, *supra* at 10-12. Indeed, the very point of BCRA limiting its regulation to broadcast media during the run-up to elections was *precisely* because those ads were the most effective form of communicating with the public in a meaningful manner and that the other forms of communication left open were less dangerous precisely because of their diminished communicative effectiveness.[9] And, as applied to GRL in particular, closing off the most effective channels of com-

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[9] To the extent that the government would claim comparable effectiveness of internet or other media communications, that is also an argument for the under-inclusiveness of the restriction and its failure of strict scrutiny. As for any claim that the government may regulate one step at a time, that is an odd suggestion in the context of strict scrutiny rather than rational basis review. It also suggests this Court's inclination to allow further restrictions to the extent that the remaining avenues prove effective at communicating to the public and hence pose similar risks to the purported government interest. Under that reasoning, each time one avenue for political speech is closed, those remaining will become more important, and thus more likely to create "corruption" or its appearance, thus justifying their regulation. That suggestion, of course, is grossly at odds with the notion that adequate avenues remain available insofar as this Court has paved the way to close off those avenues as well. Neither the government nor this Court can have it both ways.

munication will have a cascade effect reducing not just the regulated speech itself but also any resulting petitioning activity as well. Small reductions in the effectiveness of GRL at the front end thus will have amplified speech consequences at the back end that are different and greater than would result from limited burdens on other types of speech.

Fourth, the so-called PAC option likewise is not an adequate alternative. Any previous notion that establishing and maintaining a PAC is a minor administrative task has become increasingly incredible with each new round of legal obligations and restrictions on PACs and those who run them. Just the legal fees alone can be daunting for those venturing into the complex and hazardous waters of political communication. As a practical matter it is becoming impossible for ordinary citizen groups to understand, much less comply with, their obligations without expert legal advice. Only the foolhardy would attempt to join the fray without the burden and expense of such advice. Aside from the legal expense and risk, even the basic compliance obligations of record-keeping and reporting now impose a significant burden and cost, particularly on small or newly founded entities.

Gone is the ability of citizens to quickly and freely associate in support of a position as the timing of issues and the inclination of speakers align. Instead, the so-called PAC option has converted the most effective avenues of communication into a realm of professionals, with the need for substantial advance planning or ready access to existing institutional resources and expertise.

The various funding source, amount, and disclosure requirements for PACs likewise make it difficult to raise the quantities of money needed for broadcast communications. Indeed, the very facts of this case demonstrate that the PAC resources available to groups like WRTL can be wholly inadequate to enable them to use broadcast media for their message. J.S. 6. New or small organizations may have a particularly hard time given the limited number of employees and

members from whom they can solicit at all. Such difficulties in raising PAC money may deprive a PAC of the resources necessary to engage in effective communications at all, or may force small organizations to spend more time raising money than engaging in GRL itself.[10]

Finally, using the PAC option for GRL would compete with other uses for PAC money. Limited PAC resources are already the only means for corporations to make contributions or to engage in express advocacy. Expanding the scope of First Amendment activity forced through the PAC option thus decreases the amounts available for each type of protected activity. And while the limitations on PAC resources previously may have had less of an impact given the limited amounts that can be spent on contributions and express advocacy, the costs of effective broadcast GRL are not so limited and hence PAC funding constraints, as applied to GRL, will have a far more detrimental effect on such activity.

In short, the ability to effectively speak, assemble, and petition the government is not particularly free when forced into the convoluted channels of PAC activity.

Fifth, aside from the direct burden of applying BCRA to GRL, BCRA's restrictions create secondary distortions in the marketplace of ideas that amplify the First Amendment concerns. Because the funding-source limits on the PAC option disproportionately hurt smaller organizations, BCRA tilts the GRL playing field in favor of larger and better-organized entities and commercial entities with greater resources. As a practical matter, the burden of the PAC option will fall on precisely those "grass-roots" groups that rise up in timely re-

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[10] That consequence of the PAC option is particularly ironic given the Vermont campaign finance cases also pending before this Court, Nos. 04-1528, -1530, & -1697, where the State claims an interest (undoubtedly material but hardly "compelling") in avoiding the diversion of elected officials' attention due to the burden of fundraising. Surely the burden of fundraising and the diversion from core political speech constitute similarly material impositions on the exercise of constitutional rights.

sponse to current issues, but will have less of an impact on the large institutional "special" interests that were of supposed concern to Congress. It is the general public that will be deprived of any credible means of organizing themselves on an ad-hoc basis.

Constraining effective GRL also will shift power and influence to incumbents, who have far better alternatives to get out their message in the context of pushing legislative agendas and garnering free media attention. That shift gets things precisely backward, with incumbent representatives able to lobby the public through the mass media, but the public unable to organize and lobby the incumbents through the same means. And such an arrangement also enhances the power of the mainstream media, which can act as the docent of public debate in the key broadcast media, filtering issues as they see fit through the distribution of free airtime, which will inevitably be devoted more to those already in office and in control of the reins of government.

Overall, the burden imposed by applying BCRA to GRL is significant and multifaceted. Given the core value of such speech and the attenuated and misconceived government interest at stake, such burden cannot be justified under the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of United States District Court for the District of Columbia should be reversed.

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No. 04-1581

IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED*

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat 81 (2002) ("BCRA"), bans "electioneering communications," defined as television or radio (broadcast, cable, or satellite) corporate speech that, 60 days before a general election or 30 days before a primary election, refers to a clearly identified federal candidate and can be received by 50,000 or more persons in the relevant district or state. 2 U.S.C. § 434(f)(3)(C). *McConnell v. FEC*, 540 U.S. 93 (2003), held that this provision (i) served the same compelling interest in limiting corporate candidate advocacy accepted by the Court in prior cases, and (ii) would not reach enough true issue advocacy to render the definition of electioneering communication invalid on its face. The questions presented on this appeal are:

1. When compelling governmental necessity overrides the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech," and a speech restriction is enacted that is precise and tailored enough to escape facial invalidity, may that restriction be applied to core speech that the government has no compelling need to suppress?

2. Does *McConnell*'s holding that the government had a compelling need to suppress so-called sham issue advocacy that was clearly intended to influence elections and was the functional equivalent of express electoral advocacy authorize the government to suppress for up to 90 days speech that addresses active legislative issues and petitions for redress from incumbent elected officials who happen to be seeking reelection?

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* All parties have consented to the filing of this brief *amicus curiae* as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation with an underlying membership of over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and sectors—from large Fortune 500 companies to home-based, one-person operations. Ninety-six percent of the Chamber's underlying membership are businesses with fewer than one hundred employees. Collectively, the Chamber's members are central to our nation's economy and well-being.

Business corporations are profoundly affected by federal legislation, policy, and executive action on a wide range of

issues, from tort reform to taxes, intellectual property to import controls, and employment standards to environmental protection. As a result, corporations are critically interested in the formulation and implementation of federal legislation and policy and in assuring that their knowledge and concerns are fully and effectively communicated to the public, federal legislators, and other government officials. At the same time, all Americans, including American voters and government officials, have a vital interest in hearing what corporations have to say on the key issues of the day.

Some of the Chamber's members, particularly large corporations, maintain separate segregated funds, commonly called PACs, that permit some direct advocacy for or against candidates. But the vast majority do not. PACs are complex and burdensome to initiate and maintain. As of January 1, 2005, there were only 1,622 PACs sponsored by corporations registered with the FEC. *See* FEC Issues Semi-Annual Federal PAC Count (Jan. 25, 2005), http://www.fec.gov/press/press2005/20050115count.html. Only some of those PACs are sponsored by Chamber members. When an issue arises requiring comment by a corporation that does not maintain a PAC, it often is not practical for a corporation to organize a PAC, solicit contributions, and then speak out in a timely fashion. Moreover, even corporations that have PACs often will already have spent or committed PAC funds to campaigns or other purposes that must receive PAC funding before the need for issue speech is discerned. Thus, corporations have a strong interest in being able to engage in issue advocacy without the burdens and limitations of the PAC structure. And, for most corporations, requiring them to speak through a PAC is the equivalent to banning their timely speech.

Public policy largely is decided by elected officials. When an active legislative issue is before incumbent officials for action, interested persons have a compelling need to address those issues and to receive speech concerning those issues. For such speech to petition effectively for redress, it must

identify the government officials who will make the critical decisions.

A key function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive branches of state and federal governments. In that role, the Chamber was a party to the *McConnell* litigation challenging the facial constitutionality of the BCRA's restrictions on corporate political speech that are the subject of the instant as applied challenge. The Chamber regularly files briefs *amicus curiae* where the business community's right to political speech is at stake. *See Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *Elections Bd. of Wis. v. Wis. Mfrs. and Commerce*, 597 N.W.2d 721 (Wis. 1999); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). And the Chamber, which is incorporated, also has litigated to preserve its own First Amendment rights of speech and association. *See Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce of the U.S. v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

This appeal affects the ability of the Chamber and its members to exercise their core First Amendment right to speak about active legislative issues when they are being decided and to seek redress from incumbent elected officials who will do the deciding. Thus, the Chamber's special perspective and vital interests justify its submission of this brief *amicus curiae*.

STATEMENT OF THE CASE

This appeal picks up where *McConnell* left off. This Court previously has found that the government has demonstrated a sufficiently compelling need to limit candidate advocacy by corporations. *McConnell*, 540 U.S. at 205 (collecting authority). Relying on its seminal campaign finance decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court crafted a

standard that would serve that interest while avoiding overbreadth by construing the law banning corporate political speech to apply only to speech that contained explicit words expressly advocating the election or defeat of clearly identified candidates. *MCFL*, 479 U.S. at 248-49.

Over time, Congress perceived that *Buckley*'s "express advocacy" standard was too easily circumvented by so-called sham issue ads that avoided "magic words" such as "vote for" or "elect," but functioned as corporate candidate advocacy. Eventually, in the BCRA, Congress enacted a new ban on "electioneering communications"—corporate speech broadcast during months prior to an election that referred to a federal candidate and could be received by a minimum number of possible voters. 2 U.S.C. § 434(f)(3)(C).

In *McConnell*, the Chamber and others contended that BCRA's electioneering communication standard was *facially* unconstitutional because it was not narrowly tailored to the government's claimed interest in limiting candidate advocacy by corporations. By a bare majority, *McConnell* rejected that facial challenge. The majority ruled that, because speech within the electioneering communication definition "will *often* convey [a] message of support or opposition" to a candidate, the standard avoided facial invalidity because it was not substantially overbroad. 540 U.S. at 205-07, 239.[1]

This appeal asks what should occur when the facially valid electioneering communication standard is applied to suppress core speech that does not support or oppose a candidate. *McConnell* flagged this issue, noting that the justification for limiting corporate candidate advocacy left open the status of true issue speech. *Id.* at 206 n.88. Moreover, *McConnell*

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[1] *McConnell* erroneously applied a test of "substantial overbreadth," rather than the more rigorous "narrow tailoring" test required by settled precedent. 540 U.S. at 207. *McConnell* also found that the electioneering communication standard provided a precise and objective bright line test. 540 U.S. at 194.

repeatedly noted that a facially valid restriction remains open to "as applied" constitutional challenges. *Id.* at 159, 173, 244.

The as applied issue here arises from ads that appellant Wisconsin Right to Life, Inc. ("WRTL") began broadcasting in Wisconsin in July, 2004. Those ads criticized Senate filibusters of judicial nominees and urged Wisconsin viewers to petition their two Senators, Feingold and Kohl, to oppose such filibusters. The ads said nothing about the record of the two Senators, merely identifying them as the persons representing Wisconsin interests in the filibuster controversy.

Because WRTL was a corporation, its broadcast speech was potentially subject to restriction as electioneering communications. Because Senator Feingold had decided to seek reelection, as incumbent federal legislators frequently do, the ads unavoidably mentioned a candidate, though they did not identify him as such. The filibuster issue was not resolved during July.

In August, 30 days before the Wisconsin primary election, BCRA's electioneering communication blackout period began. At that point, the threat of serious civil and criminal sanctions forced WRTL to suppress its ads, even though the filibuster issue was coming to a head in the Senate where Senator Feingold still held office. Indeed, because the blackout period also included the 60 days before the general election, *WRTL faced a nearly three-month ban on core speech directed not to the election but to an active legislative issue then being decided by incumbent office holders.*[2]

WRTL's situation is not unique. Nothing prevents vital legislative issues from coming to the fore during the three months prior to a general election and, indeed, that often has

[2] WRTL reasonably could believe that the filibuster of judicial nominees threatened the organization's broader policy goals. WRTL explained why its theoretical right to speak through a PAC was not viable.

occurred. In the *McConnell* record, the ACLU listed 29 instances of action by the 106th Congress on bills of interest to the organization during the 60 days prior to the November, 2000, elections. *See McConnell* J.A. at 622-626 (attached at Appendix). In the *McConnell* district court litigation, Judge Leon listed various "important, and controversial, pieces of legislation" that were considered by Congress during the blackout period, concluding that they illustrate "BCRA's potential impact on genuine issue advocacy." *McConnell v. FEC*, 251 F. Supp. 2d 176, 793 n.98 (D.D.C. 2003) ("a resolution authorizing the use of armed force against Iraq . . .; an election reform bill . . .; legislation to establish the Department of Homeland Security . . .; and various appropriations bills"). In addition, the 108th Congress held 157 roll call votes in the 60 days leading up to the November, 2004, elections. *See* United States House of Representatives and United States Senate Roll Call Votes, 108th Congress – 2d Session (2004), *at* http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm,http://clerk.house.gov/evs/2004/ROLL_400.asp, and http://clerk.house.gov/evs/2004/ROLL_500.asp (last visited Oct. 28, 2005). Lastly, it is not unusual for legislators to maneuver to set sensitive votes in the election period. *See, e.g.*, Andrew Mollison, *Votes on Guns, Marriage Slated; GOP Leaders in House Push Symbolic Bills*, Atlanta Journal-Const., Sept. 28, 2004, at 3A.

Corporations who need to address those issues and urge the public to call for redress by their elected representatives often will find themselves facially barred by the electioneering communication standard. Such situations may not be so common as to justify holding the electioneering communication standard facially invalid—though the Chamber disagrees with this point and litigated it in *McConnell*--they are important to those involved and to our core constitutional values.

WRTL brought an action seeking preliminary relief to allow it to continue its ads. WRTL argued that simple inspection of its ads showed that they did not advocate for or against any candidate but, instead, addressed an active legislative issue and mentioned the incumbent officials who could provide redress. Thus, the need to restrict corporate candidate advocacy that *McConnell* relied on to justify the electioneering communication standard did not apply to the WRTL ads or to similar speech. Because any suppression of core speech is irreparable injury and the First Amendment establishes a strong public interest in free speech, WRTL argued that preliminary relief should be granted.

As required by section 403 of the BCRA, the action was considered by a 3-judge panel of the U.S. District Court for the District of Columbia. That court denied preliminary relief, ruling *inter alia* that:

- Although *McConnell* only "was considering a facial challenge," it precluded all "as applied" challenges by ruling that "we uphold all applications" of the electioneering communication standard, thus barring relief as a matter of law.
- Because WRTL's ads were of a general type that *McConnell* said "often" will communicate an electioneering message (e.g., broadcast by a corporation near an election and referring to a candidate) and WRTL's PAC opposed Senator Feingold, WRTL could not show that its ads did not implicate the government interest in suppressing corporate candidate advocacy.
- WRTL faced little injury because it retained the theoretical right to address the issue of filibusters in other ways, including through its PAC.

- The "public interest [in suppressing the ads] is already established by the Court's holding [in *McConnell*] and by Congress' enactment."

Shortly thereafter, the panel entered a final order of dismissal "for the reasons set forth" in denying preliminary relief.

WRTL appealed to this Court, noting that, although the occasion for its particular ads had passed, this was a situation capable of repetition while avoiding review, that WRTL intended to finance similar speech in the future, and that this Court usefully could begin to mark the contours of as applied challenges to the electioneering communication standard. WRTL further observed that, because BCRA funnels all such as applied challenges to the same district court, the precedents set by that court were particularly important and could not be shaped by the differing views of other courts.

The FEC moved to dismiss the appeal or summarily affirm the judgment, asserting *McConnell* was dispositive. This Court denied the motion and agreed to consider both whether as applied challenges are viable in light of *McConnell* and whether WRTL's ads should have been protected.

SUMMARY OF ARGUMENT

The as applied relief sought here relieves a fundamental tension between *McConnell*'s rationale and its holding. *McConnell* reasoned that the substance of corporate speech, not its form, determined the government's need to regulate. So-called sham issue ads that were "the functional equivalent of express advocacy" in substance clearly advocated for or against candidates. *McConnell*, 540 U.S. at 206. The same compelling interest the Court has found adequate to justify suppressing corporate express advocacy also justified suppression of functionally equivalent speech cast in the form of issue ads.

However, having just held that substance trumped form, *McConnell* then sustained a definition of forbidden speech—

the electioneering communication standard—based on form rather than substance. The test looked to such formal matters as where and when speech was broadcast and whether a candidate was identified, giving no weight to whether the speech functioned as candidate advocacy.

This tension between *McConnell*'s rationale and result had a reason. To assure core speech is not deterred by uncertainty, First Amendment facial analysis requires the government to provide a sufficiently tailored bright line definition of the speech that is regulated. Such a definition may well employ formal elements that are objective, easily identified, and reasonable markers for the speech the government may regulate. The resulting bright line plays a valuable primary role in identifying speech that poses no risk of regulation. Assuming it is sufficiently tailored, it defines a substantial area in which speech is not needlessly chilled by uncertainty and risk. But such a line inevitably will encompass some speech that the government has no compelling need to regulate.

At the same time, the First Amendment commands categorically "Congress shall make no law . . . abridging the freedom of speech," a command that applies with full force to corporate as well as individual speech. Although compelling necessity may override that command, that rationale sets its own limits. If the government does not actually need to suppress particular speech, the First Amendment commands that the speech be freely allowed.[3]

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[3] This consideration distinguishes ordinary economic and social legislation. In that context, the due process and equal protection clauses demand only minimal rationality. Thus, if formal markers have a reasonable association with substance, the basic constitutional commands are met and the legislation may be enforced categorically, unless it trenches on some other constitutional guarantee. The unique aspect of legislation regulating core speech is that it all transgresses a core constitutional command, so that mere rationality of classification is not a sufficient

There is nothing novel about using as applied challenges to assure that facially valid provisions do not suppress more core First Amendment activity than is strictly necessary. To the contrary, *McConnell* repeatedly observed that provisions sustained against facial attack remained open to as applied challenge. Indeed, since most types of statutes typically are presumed to be valid, the great majority of as applied challenges involve provisions that are presumed facially valid.[4]

Importantly, as applied challenges are no substitute for the narrowly tailored and objective bright lines demanded by First Amendment facial analysis. Such lines are critical. But neither do as applied challenges conflict with a bright line standard. Instead, they are an important backstop, making sure that the unavoidable limits of legislative foresight and precision do not convert into needless suppression of core speech. Indeed, but for the as applied safety valve, the First Amendment might demand a standard of legislative draftsmanship that would be not just high but virtually impossible.[5]

The challenge for this Court is to establish standards for as applied challenges that will permit them to serve a meaningful speech-protecting role. This need not be done all at once. A benefit of as applied analysis is the opportunity it affords to assess specific circumstances in the light of ex-

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justification. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

[4] Statutes that substantially burden core First Amendment speech are presumed invalid. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). But that does not mean that a finding of facial validity immunizes them from as applied attack. To the contrary, because they operate in a field where the First Amendment forbids Congress to legislate, they must be scrutinized with particular care.

[5] The real risk is that the availability of as applied challenges may lead to acceptance of needlessly low drafting standards. The front line protection of First Amendment values is rigorous facial scrutiny that insists on precise and objective standards that are carefully tailored to the necessity for regulation.

perience. But this Court should not rule so narrowly that every proposed ad must be litigated. Instead, this Court repeatedly has employed as applied litigation to identify categories to which a facially valid standard cannot lawfully apply. *See infra* Section III.

The facts presented by WRTL identify one common circumstance to which the electioneering communication standard does not properly apply. From time to time, elected representatives will be dealing with an active legislative issue in the 90 days prior to an election. For example, a list of such active legislative issues that were pending during the blackout period in 2000 is attached.

Affected corporations must be free to address such issues freely and to urge citizens who agree to petition their incumbent elected officials for redress, even if they happen to be seeking reelection (as incumbents often do). Foreclosing such speech for 90 days—an eternity in public debate—is truly Draconian.[6] Yet permitting such true issue speech would not threaten the interest in limiting corporate electoral advocacy relied on by *McConnell*. Accordingly, this Court should hold that:

- The electioneering communication standard is open to as applied challenges; and
- The electioneering communication standard cannot constitutionally be applied to speech that addresses an active legislative issue and refers to a candidate only in his or her role as an elected official.

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[6] The Chamber expects that WRTL and other participants will discuss why organizing and operating a PAC is a serious burden and often is entirely impractical. For corporations that do not have a PAC in place or whose PAC resources have been committed elsewhere, the electioneering communication provision will operate as a ban. In any event, this Court has held that subjecting core speech to substantial burden is a prohibited abridgment that must be justified by compelling necessity. *See MCFL*, 479 U.S. at 263.

ARGUMENT

I. CORE FIRST AMENDMENT GUARANTEES INCLUDE THE RIGHT OF CORPORATIONS TO SPEAK ON PUBLIC ISSUES AND THE RIGHT OF WILLING MEMBERS OF THE PUBLIC TO RECEIVE SUCH SPEECH

This Court has been clear that corporate speech on public issues is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940), and is part of "the free flow of information" the First Amendment protects, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Thus, in case after case this Court has held that corporate speech merits the same high level of First Amendment protection afforded to speech by individuals. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19 (1986); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657, 699-701 (1990) (unanimous as to "strict scrutiny" standard of review); *McConnell*, 540 U.S. at 330 (Kennedy, J., dissenting) ("All parties agree strict scrutiny applies. . . .").

The First Amendment protects "speech" rather than merely speakers, and the process of meaningful speech also involves listening. Thus, the right of free speech protected by the First Amendment includes the right to receive information from willing speakers, including corporations. *See Bellotti*, 435 U.S. at 783 ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] . . . necessarily protects the right to receive

it.") (internal citation omitted). In particular, the First Amendment protects the right to receive political, social, and other information related to the functioning of government, *see Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)), including information about "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Without such a right, the First Amendment's universally recognized purpose of assuring free discussion of public affairs so that truth will ultimately prevail cannot be achieved. *See id.*; *Kleindienst*, 408 U.S. at 763 (1972) (citing *Red Lion Broad. Co.*, 395 U.S. at 390).[7]

In short, corporate speech on public issues receives the same high degree of First Amendment protection as speech by individuals. Although *McConnell* sustained the corporate prohibition on engaging in electioneering communications, it did so because "the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office" and electioneering communications "are the functional equivalent of express advocacy." 540 U.S. at 205-06. But that rationale implies its own limit—suppression of core speech must be no broader than is strictly necessary.

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[7] As this discussion demonstrates, corporate discussion of issues is entitled to the highest level of protection, not the lesser protection sometimes afforded to "commercial speech." But even commercial speech is highly protected. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999).

II. *McCONNELL*'S RECOGNITION OF A COMPELLING NEED TO LIMIT SHAM ISSUE ADS THAT WERE THE FUNCTIONAL EQUIVALENT OF EXPRESS CANDIDATE ADVOCACY DOES NOT JUSTIFY SUPPRESSING TRUE ISSUE ADVOCACY BY CORPORATIONS

Where the First Amendment's core provision is set aside to serve compelling necessity, that need must be precisely defined to mark out the limits of permissible suppression of speech. *McConnell* simply applied prior rulings accepting a compelling governmental interest in protecting candidate elections from corruption that threatens the link between the popular will and those who govern. 540 U.S. at 206 n.88 ("unusually important interests [in] '[p]reserving the integrity of the electoral process'") (citing and quoting *Bellotti*, 435 U.S. at 788-89). Moreover, this Court has held that corporate advocacy for or against candidates poses such a threat and justifies a departure from the First Amendment's categorical command that Congress "make no law" abridging free speech. *Id.* at 205 (collecting authority).[8]

But the Court has never found a compelling need to regulate corporate issue speech that does not advocate for or against candidates. To the contrary, it repeatedly has protected true corporate issue advocacy. For example, *Bellotti* flatly rejected any notion that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation." 435 U.S. at 784. Emphasizing that First Amendment rights have "particular significance with respect to government," *id.* at

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[8] The empirical and theoretical grounds for this conclusion are weak, and the Chamber hopes the Court eventually will revisit the issue. For present purposes, however, the Chamber assumes that a compelling interest justifies excluding most corporations (but not "*MCFL*" or media corporations) from electoral advocacy.

777 n.11, *Bellotti* held that the state had no compelling need to forbid corporate issue advocacy.

Similarly, *Consolidated Edison Co.* found no justification for preventing even a regulated corporate monopoly from addressing "controversial issues of public policy." 447 U.S. at 537. Stressing that the corporate nature of a speaker does not undermine "the inherent worth of the speech in terms of its capacity for informing the public," it forbade the state to interfere with the corporation's use of space in its billing envelopes for issue advocacy. *Id.* at 530 (quoting *Bellotti*, 435 U.S. at 777).[9]

Buckley clearly understood the government's legitimate concern to be limited to restricting candidate advocacy rather than true issue speech. Thus, in crafting a narrowing construction intended to cure vagueness and overbreadth, *Buckley* focused on speech using explicit words that expressly advocated the election or defeat of clearly identified candidates. 424 U.S. at 43-44.

When Congress concluded that the express advocacy standard proved ineffective to restricting corporate candidate advocacy, Congress created and *McConnell* approved the electioneering communication standard. *McConnell* said that corporate issue speech was not so rigidly protected that merely adopting the form of issue speech precluded all regulation. 540 U.S. at 193. Instead, the issue was one of substance: the government was equally entitled to reach so-called sham issue ads that "do not urge the viewer to vote for or against a candidate in so many words [but] *are no less*

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[9] The corporate form of certain nonprofit organizations is disregarded for purposes of the restrictions at issue in this case. *See* 11 C.F.R. § 114.10 (exempting *MCFL* corporations from electioneering communication ban). Like the vast majority of corporations, WRTL is not such an organization. This case, like *Bellotti* and *Consolidated Edison Co.*, concerns restrictions on the speech of true corporations.

clearly intended to influence the election." *Id.* (emphasis added).

Thus, *McConnell* held that the new electioneering communication standard served the same compelling interest in restricting corporate candidate advocacy that had justified applying *Buckley*'s express advocacy standard to corporate speech. In response to arguments that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications," *McConnell* responded:

> This argument fails *to the extent that the issue ads* broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy*. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voter's decisions and have that effect.

Id. at 206 (emphasis added). In short, the need to regulate depended on whether the ads, in fact, functioned as express advocacy, not on their form.

Ironically, having held that the government's need to suppress speech was determined by its substance—functioning as candidate advocacy—*McConnell* sustained an electioneering communication standard that, like the express advocacy standard, turned on issues of form. *Id.* Although *McConnell* concluded that the formal incidents specified by the electioneering communication standard often are markers for candidate advocacy, the Court recognized this need not always be so. *Id.* at 206-07.

McConnell acknowledged that "the interests that justify the regulation of campaign speech might not apply to the regulation of *genuine issue ads.*" *Id.* at 206 n.88 (emphasis

added).[10] In fact, the record in *McConnell* included evidence of such genuine issue speech by corporations. *See, e.g.*, *McConnell* J.A. at 328 (the Chamber supported ads "that urged Senator Daschle to schedule a Senate vote on Eugene Scalia's nomination as Solicitor of Labor"), 286 (the National Association of Manufactures ran ads supporting the President's tax proposal and "referred to the proposal as being that of the President"). Nonetheless, the Court held the electioneering communication standard to be sufficiently tailored because "the vast majority" of ads within its language were the "functional equivalent" of express advocacy and "clearly had [the same] purpose." *Id.* at 206; *see also Colo. Right to Life Comm., Inc. v. Davidson*, No. 03-CV-1454, 2005 WL 2450157, at *13 (D. Colo. Sept. 30, 2005) ("if the government wishes to justify a regulation of corporate political activity under [*McConnell*], it must demonstrate that the regulated activity is 'the functional equivalent of express advocacy.'")

In sum, the electioneering communication standard was held facially valid because it met the government's compelling need to restrict corporate speech that was the functional equivalent of express candidate advocacy. *McConnell* did not find any compelling need to suppress genuine corporate issue speech. It merely predicted that such genuine issue ads would not be affected frequently enough to justify holding the standard facially invalid. *McConnell* clearly left the door open to restrict application of the electioneering communication standard to speech that does not function as express candidate advocacy.

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[10] Context makes clear that *McConnell* uses "genuine issue ads" to distinguish speech that is the "functional equivalent" of express advocacy. To illustrate the "so-called issue advocacy" targeted by the electioneering communication standard, *McConnell* quoted an ad that accused a candidate of beating his wife and failing to support his children. 540 U.S. at 193 n.78.

III. THE "ELECTIONEERING COMMUNICATION" PROVISIONS OF BCRA CANNOT CONSTITUTIONALLY BE APPLIED TO SUPPRESS CORPORATE ADS THAT ADDRESS ACTIVE LEGISLATIVE ISSUES AND SEEK REDRESS FROM INCUMBENT REPRESENTATIVES

Although as applied challenges typically are supported by one or more concrete examples, the Court often describes a category of speech that is protected from the primary standard. For example, *Edenfield v. Fane*, 507 U.S. 761 (1993), entertained a challenge to promotional activities by Certified Public Accountants. The Court accepted that there could be a need to protect individuals from such activities. But because businesses tend to be more sophisticated and less vulnerable, the Court held that "as applied to CPA solicitation in the business context," the statute violated the First Amendment. 507 U.S. at 763; *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 431 (1993) (*Fane* sustained an "as applied challenge to a broad category of commercial solicitation"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (holding an obscenity statute invalid as applied to some definitions of "lust" but not others). Similarly, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 620-22 (1996), held that general spending restrictions could not be applied to "independent expenditures" by political committees. And *United States v. National Treasury Employees Union*, 513 U.S. 454, 478 (1995), held that a restriction on honoraria violated the First Amendment as applied to federal employees in lower pay grades. There, although Justice O'Connor's partial dissent preferred to describe a different category of protected speech, she accepted the basic approach, saying:

> There is a commonsense appeal to the Government's argument that, having deemed a particular application of a statute unconstitional, a court should not then throw up

> its hands and despair of delineating the area of unconstitutionality.

513 U.S. at 486.

Similarly here, the specific circumstances presented by WRTL illustrate a category of corporate speech to which the electioneering communication standard cannot constitutionally be applied.[11] In addition to protecting that particular speech, this Court can best advance First Amendment goals by delineating that category. The Chamber suggests that category of speech has two defining characteristics: (i) it addresses an active legislative issue, and (ii) it refers to candidates only in their capacity as incumbent elected officials with responsibility for the issue being discussed.

A legislative issue is active when it is pending for action in Congress during the electioneering communication blackout period. For example, the judicial filibuster issue addressed by the WRTL ads was active because filibustered nominations were pending in the Senate, the Senate remained in session, and Senators were actively considering potential solutions. Such an active legislative issue urgently and logically justifies discussion during the blackout period and is not mere "past history" dredged up as a pretext for candidate advocacy.

Similarly, incumbent legislators who have responsibility for acting on such an active issue are logical and necessary persons to be named in such issue discussions. In the case of the WRTL ads, whom else should viewers in Wisconsin petition to end judicial filibusters than their own elected

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[11] Of course, there is no need for the Court to identify all categories to which a standard may not be applied. The Court may proceed incrementally as particular challenges illuminate particular categories that should be protected from the general rule. However, given the First Amendment imperative to suppress no speech unnecessarily, the Court should not be unduly restrained in identifying the categories or principles that justify as applied protection.

Senators? Referring to elected representatives only in that role, and not as candidates or the subject of electoral exhortation, allows effective petitioning without inviting candidate campaigning.

An exception to the definition of electioneering communication that these two elements mark as true issue advocacy would be clear and objectively determinable.[12] It would not replace that essential bright line that this Court has required is necessary before regulating core speech, *Buckley* 424 U.S. at 42-44, but will provide fallback protection for speech this Court has never empowered Congress to regulate.

Such an exception would restore the core First Amendment right of the Chamber and other business organizations to speak out on active legislative issues of importance to the business community whenever they arise. *See supra* at 17 regarding ads urging Senate votes on federal nominees and ads supporting the President's proposed tax plans. The exception would also avoid incentivising incumbent federal office holders to avoid public criticism for their official acts by scheduling them during the electioneering communication blackout period.

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[12] WRTL offers a list of further criteria confirming that its proposed speech would not justify suppression. The Chamber submits that most of these factors simply are not necessary and would pointlessly circumscribe this Court's delineation of the protected category.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

106th Congress
Congressional Action During the 60 Days Prior to November Election on Bills of interest to the ACLU

Capital Punishment:

- "Sense of Congress" regarding the obligation of grantee states to ensure access to post-conviction DNA testing and competent counsel in capital cases (Amdt. 4345 to S. 3045): Introduced in the Senate on 10/26/2000.

Chruch-State:

- Bill to protect religious groups in land-use disputes (S 2869) signed by the President on 9/22/2000; P.L. 106-274.
- Allows faith-based organizations to receive federal support for programs to help low income fathers get more involved in their families' lives (HR 4678): Passed House 9/7/2000.

Criminal Justice:

- Provide grants to states to process backlog of DNA evidence (HR 4640): Passed House 10/2/2000.
- Pressure states into requiring HIV testing of rape suspects who have been formally charged, by threatening to withhold federal crime-fighting block grant money (HR 3088): Passed House 10/2/2000.
- Aimee's Law: cuts federal crime fighting money to states if convicted murderers & rapists did not serve stiff sentences and went on to commit offense in another state (part of HR 3244): Passed Senate 10/11/2000.

Gay and Lesbian Issues:

- Repeal federal charter of Boy Scouts, in reaction to Supreme Court: decision that allows Boy Scouts to discriminate against homosexuals (HR 4892): Defeated in House 9/13/2000.
- Prohibit using local or federal funds for needle exchange (amendment to HR 4942): Passed House 9/27/2000.
- Prohibit the use of Federal funds for the conduct or support of programs of HIV testing that fail to make every reasonable effort to inform the individuals of the results of the testing (HR 5615): Introduced in the House on 10/11/2000.

Hate Crimes:

- Expansion of federal hate crimes law (amendment to S 2549): House voted to instruct conferees to accept amendment 9/13/2000; conferees dropped language from bill 10/5/2000.

Immigration:

- Allow some immigrants who committed minor crimes long ago to apply to stay in US and not be deported; part of "Fix `96" (HR 5062); Passed House 9/19/2000.

Internet Filtering

- Force schools and libraries to use technology protection measures to block access by children to web pornography (amendment to HR 4577): Conferees added this provision to the bill 10/23/2000.

Media & Violence

- Require violent TV programming be limited to hours when children are not likely to be a substantial part of audience (S 876): Approved by Senate Commerce committee 9/20/2000.

Physician-Assisted Suicide:

- Overturns Oregon's law that permits physician-assisted suicide (amendment to HR 2614): Passed House 10/26/2000; Filibustered in Senate 10/27/2000.

Privacy:

- Restrictions on law enforcement use of electronic surveillance (HR 5018): Approved by House Judiciary subcommittee 9/14/2000; Mark-up by House Judiciary committee 9/20/2000.
- Creation of commission to study issue of privacy on the internet (HR 4049): Defeated in House 10/2/2000: failed to get 2/3's majority needed for passage under suspension of rules.
- Prohibit the appearance of Social Security account numbers on or through unopened mailings of checks (HR 3218): Passed House 10/18/2000; Passed Senate 10/25/2000.
- Enhance privacy protections for individuals, and to prevent fraudulent misuse of Social Security account numbers (HR 4857): House full committee mark up on 9/28/2000.

Reproductive Rights:

- Funding prohibition in DC Approp. (HR 4942; HR 5633): Passed both House and Senate on 11/14/2000.
- "Conscience clause" to employee-sponsored health plans coverage of contraceptives (amendment to HR 4942): Passed House 9/14/2000.
- Abortion restrictions on international family planning aid (HR 4811): Conference Committee appointed 10/19/2000; House debates conference report 10/25/2000;

- Define "human being;" seeks to protect humans born alive at any stage of pregnancy (HR 4292): Passed House 9/26/2000.
- Prevent abortion protestors convicted of violent crimes from seeking bankruptcy protection to avoid paying hefty legal penalties (amendment to S 3046): Senate voted to proceed with debate on 10/19/2000.
- Prohibit use of funds to distribute postcoital emergency contraception "morning after pill" on elementary or secondary school premises (HR 4577, Labor/ HHS Approp.): Pre. Coburn announces intention to offer motion to instruct House conferees on this amendment on 9/18/2000.

Secret Evidence

- Makes it harder for INS to use secret evidence to deport immigrants or to deny tem [sic] asylum (HR 2121): Approved by House Judiciary Committee 9/26/2000.

Terrorism

- Provide clearer coverage over threats against former Presidents and members of their families (HR 3048): House disagreed with certain Senate amendments on 10/25/2000.

Trafficking Victims:

- Combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions (HR 3244): Passed Senate 10/11/2000.

Violence Against Women:

- Reauthorization of VAWA (HR 1248): Passed House 9/26/2000; Passed Senate as par [sic] of HR 3244 0/11/2000 [sic].

Voting Reform

- Proposing a constitutional amendment to abolish the electoral college and to provide for the direct popular election (SJRes 56): Introduced in the Senate on 11/01/2000. Proposing a constitutional amendment to abolish the electoral college (HJRes 113): Introduced in the House on 10/12/2000.

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IN THE
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF AMICUS CURIAE OF CITIZENS UNITED AND CITIZENS UNITED FOUNDATION IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

Citizens United ("CU"), a Virginia corporation, is a nonprofit educational and advocacy membership organization, exempt from federal income taxation pursuant to section 501(c)(4) of the Internal Revenue Code ("IRC"). CU is dedicated to certain important principles, including those of limited government, national sovereignty and rights secured under the United States Constitution, and it presents and communicates its views and the views of its members on legislative and public policy issues to federal, state and local government officials, as well as the general public. Citizens United Foundation ("CUF"), a Virginia corporation, is a nonprofit, nonpartisan, educational organization exempt from federal income taxation pursuant to IRC section 501(c)(3). CUF conducts research and informs and educates the public on a variety of issues of national importance, including issues related to belief in God, the role of traditional families and religious traditions in American society, the original intent of the Framers, and the correct interpretation of the United States Constitution.[1]

CU and CUF have filed *amicus curiae* and other briefs, in federal litigation, including matters before this Court. CU was a party plaintiff making a facial challenge to certain provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") (Pub. L. 107-155) in McConnell v. FEC, 540 U.S. 93 (2003) ("McConnell"), upon which the court below purported to base

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief. These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief, in the form of letters from counsel of record for appellant and appellee, and these have been submitted to the Clerk of Court for filing. *See* Sup. Ct. R. 37.3(a).

its decision denying consideration of Appellant Wisconsin Right to Life, Inc.'s ("WRTL") as-applied challenge to the prohibition against "electioneering communications" as defined in BCRA § 201 (2 U.S.C. § 434(f)(3)(A)(i)). CU and CUF both believe that the district court's decision refusing to consider the WRTL's constitutional challenge to the application of BCRA § 201's definition of "electioneering communications" to WRTL's particular issue ads misapplied the holding of the McConnell Court. Further, they believe that, had the district court correctly interpreted that holding, then the McConnell majority's decision on the constitutionality of BCRA § 201 was (a) an unconstitutional use of power inconsistent with Article III of the Constitution which limits the exercise of judicial power to cases and controversies, and (b) a denial of WRTL's liberty without due process of law in violation of the Fifth Amendment.

CU and CUF trust that their perspective on the issues — particularly due process and separation of powers principles — will be of assistance to the Court in deciding this appeal. Although the prohibition against electioneering communications by IRC section 501(c)(4) organizations, such as CU, has been in force since the passage of BCRA, to date communications by IRC section 501(c)(3) organizations, such as CUF, have been specifically exempted. *See* 11 CFR §100.29(c)(6). However, the regulation exempting 501(c)(3) organizations has been found lacking by the district court in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), and the Federal Election Commission ("FEC") is considering new regulations on the subject. *See* FEC Notice of Proposed Rulemaking, 70 Fed. Reg. 16,967 (Apr. 4, 2005). According to the district court's reading of the McConnell opinion, any constitutional challenge to such proposed regulations as applied to a CU or CUF communication may be unreviewable on the merits.

In conducting their educational activities, these *amici* have already encountered rulings by the FEC that they believe infringe upon their constitutional rights of freedom of speech and press. For example, both CU and CUF have produced, and are planning to continue to produce, documentary films. With respect to the broadcast of such a film produced in 2004 — *Celsius 41.11* — CU sought from the FEC an exemption from the definition of electioneering communications under the news media exemption set forth in 11 CFR § 100.29(c)(2). On September 10, 2004, the FEC issued Advisory Opinion 2004-30, effectively denying the exemption by concluding (i) that the movie and its proposed broadcast advertising would qualify as electioneering communications if CU paid to broadcast them during BCRA's electioneering communications blackout period, and (ii) that the news media exemption did not apply to CU as it had not previously produced documentaries. Under the lower court's determination, it is possible that the FEC's Advisory Opinion 2004-30 could be construed as the final, non-appealable word on the subject, including its constitutionality.

In 2005, CU and CUF co-sponsored the production and distribution of *Broken Promises: The United Nations at 60*, a film of undeniable educational value, which mentions certain well-known figures who could become candidates for federal office in the foreseeable future. Other like documentary films dealing with other public policy issues are in the planning stage. Given the FEC's narrow interpretation of the news media exemption, and increasingly broad application of the electioneering communication regulations, the ruling of the three-judge court below — that the constitutionality of the FEC's application of the definition of "electioneering communications" are non-reviewable by an Article III court — could effectually censor many public educational messages, having nothing whatever to do with the evasive use of "sham issue ads" that led to the "electioneering communication"

regulations. Thus, CU and CUF have a strong interest in this case. Should this Court affirm the lower court's determination that substantially all "as-applied" challenges to the constitutionality of the "electioneering communication" definition are foreclosed by the decision in McConnell, such ruling would adversely impact CU's and CUF's educational missions in ways that the McConnell Court never considered.

SUMMARY OF ARGUMENT

Notwithstanding that WRTL was **not** a party to the McConnell litigation, that the July 2004 issue ads were **not** in evidence in that litigation, and that WRTL's constitutional claim was **not** made in that litigation, the district court below dismissed WRTL's constitutional challenge, **not** on the merits, but upon the sole ground that the reasoning of this Court in McConnell precluded judicial review. By failing to address on the merits WRTL's dramatically different constitutional claim that BCRA § 201's definition of "electioneering communication" **as applied** to certain issue ads composed and broadcast **after** McConnell was decided, the district court committed reversible error.

First, the District Court **misapplied** McConnell, erroneously ruling that the McConnell "reasoning" required dismissal of WRTL's constitutional claim without reaching the merits, instead of correctly applying the McConnell "reasoning" to ascertain whether that reasoning required a rejection of WRTL's claim on the merits. By misapplying McConnell to avoid deciding WRTL's claim on the merits, the court below, in effect, ruled that WRTL's constitutional claim is subject to the unreviewable power of the FEC. This extraordinary deferral to administrative discretion is not supported by a fair reading of the McConnell opinion upon which the district court relied. Moreover, the district court's misapplication of

McConnell denying judicial review to WRTL's "as applied" claim conflicts with BCRA § 403's authorization of comprehensive judicial review of the constitutionality of any provision of BCRA and the long-standing presumption favoring judicial review of the constitutionality of the actions of administrative agencies.

Second, the district court **misread** the McConnell decision, transforming it into an unconstitutional exercise of power to issue advisory opinions binding upon an entity that was not a party to the case. Additionally, it misread the McConnell decision in violation of the principle that constitutional claims should not be "adjudge[d] ... except when **definite** rights appear upon the one side and **definite** prejudicial interferences upon the other." *See* United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947) (emphasis added). Even if the opinion in McConnell appeared to reach beyond the claims of the litigants in that case, it should not have been read to give the claim-preclusion effect accorded by the three-judge court below, which foreclosed WRTL from presenting a constitutional claim **not** made in McConnell on facts **not** introduced in McConnell by an entity **not** a party in McConnell.

Finally, the district court **misused** McConnell, by assuming the contents and circumstances of WRTL's issue ads were comparable to the issue ads in the McConnell record, and thus divorcing the McConnell "reasoning" from its factual setting. In doing so, the court below engaged in the very kind of abstract decision-making that the Article III, Section 2 limitation upon the exercise of judicial power was designed to prevent. Misusing McConnell to deny WRTL a right to be heard on its constitutional claim in an Article III court is a denial of WRTL's liberty without due process of law.

ARGUMENT

I. WRTL'S CLAIM WAS NOT PRESENTED IN THE MCCONNELL LITIGATION.

On February 14, 2002, the United States House of Representatives passed the Bipartisan Campaign Reform Act of 2002 ("BCRA") (Pub. L. 107-155). One month and six days later the BCRA passed the Senate. Prior to passage of the bill in the Senate, President George W. Bush was urged by many Congressional Republicans to veto the bill.[2] Despite such urging, the President did not veto BCRA, even though in his message announcing his decision to sign he stated that the "bill does have flaws ... present[ing] serious constitutional concerns." "President Signs Campaign Finance Reform Act," Statement by the President (March 27, 2002).[3] Among these stated concerns was the "broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election." *Id.* To justify his decision to sign the bill, notwithstanding his reservations about the constitutionality of some of its provisions, the President explained that he "expect[ed] that the **courts** will resolve these legitimate legal questions as appropriate under the law." *Id.* (emphasis added).

And that is precisely what occurred. On the very day after the President signed the bill, lawsuits challenging the

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[2] Reminding the President of his campaign promises — including the right of citizen groups to engage in issue advocacy — these elected representatives contended that BCRA "overtly violates the constitutional principles you swore as President to uphold." *See* March 4, 2002 letter to President Bush signed by 26 members of Congress http://johnshadegg.house.gov/rsc/word/CFRBushLetter2.doc.

[3] 38 Weekly Comp. Pres. Doc. 517-18 (Apr. 1, 2002).

constitutionality of almost every provision of BCRA were filed, as provided in BCRA § 403, subsection (a) of which authorized "any action ... for declaratory or injunctive relief to **challenge the constitutionality** of any provision of this Act or any amendment made by this Act." BCRA § 403(a) (emphasis added). Additionally, BCRA provided for relief on an "expedited" basis, by requiring a trial before a special three-judge federal district court in the District of Columbia, and a right of direct appeal to the United States Supreme Court, rather than the normal intermediate appeal to a United States Court of Appeals and discretionary review by the Supreme Court.

To ensure congressional monitoring of any judicial activity challenging its constitutionality, BCRA required that a "copy of [any] complaint [filed thereunder] ... be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate." *See* BCRA § 403(a)(2). Thus, any member of Congress would be put on the alert so as to take advantage of the special "right to intervene," conferred upon him by BCRA § 403(b). Further, if any member of Congress wished to challenge the constitutionality of BCRA, BCRA § 403(c) granted a special congressional right to "bring an action ... for declaratory or injunctive relief to challenge the constitutionality" of BCRA. By granting to themselves express statutory authority to intervene and to sue, BCRA § 403(b) and (c) were presumably designed to eliminate any question whether a member of Congress had suffered legal harm sufficient to meet the judicial standards governing standing to sue. *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997).

On March 20, 2002, the very day that BCRA passed the Senate, after having previously passed the House, but before the President signed it into law, Senator Mitch McConnell — perhaps BCRA's most vocal opponent in Congress —

announced plans to launch a "swift Supreme Court challenge." *See* "Congress Approves Campaign Finance Reform," *U.S. Today* (Mar. 20, 2002).[4] On the very next day, Senator McConnell announced his legal team. And, on March 24, 2002, members of McConnell's "dream team" appeared on CNN's Late Edition discussing their constitutional objections to the new legislation. "CNN: Opponents of Campaign Finance Reform Vow to Go to Court" (Mar. 24, 2002).[5] So poised to strike, "[o]n the morning of March 27, 2002," and "[w]ithin hours" after President Bush signed BCRA into law, Senator McConnell filed his complaint in the District Court. McConnell v. FEC, 251 F. Supp. 2d 176, 206 (D.D.C. 2003). Although the National Rifle Association beat Senator McConnell to the courthouse door, Senator McConnell's name was placed at the head of an eventual crowd of "eighty-four plaintiffs challenging twenty-three provisions of BCRA." *Id.* at 208.

As large as this group of plaintiffs became, WRTL was not among them. *See* McConnell v. FEC, 251 F. Supp. 2d 176, 221-26 (D.D.C. 2003) (*per curiam* opinion). Nor were the three issue ads composed and broadcast by WRTL among the "issue ads" considered by the three-judge district court, having been composed and broadcast in 2004, after the McConnell trial had ended. *See* WRTL Jurisdictional Statement ("WRTL Jur. Stmt."), Appendix, pp. 13a-17a (May 23, 2005). Nor was the constitutional argument submitted by WRTL in the court below considered either by the three-judge district court or the Supreme Court in the McConnell case. *See* McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93. Indeed, the Supreme Court in McConnell

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[4] Reprinted in http://www.campaignlegalcenter.org/press-810.html.

[5] http://www.cnn.com/TRANSCRIPTS/0203/24/le.00.html.

decided that BCRA's Title II definition of "electioneering communications" was constitutional **solely** on its face and **solely** on the ground that it need not conform to the Buckley[6] standard of "express advocacy" of the election or defeat of a named candidate for election to a federal office. *See* McConnell v. FEC, 540 U.S. 93, 187-194 (2003). In the court below, however, WRTL has put forward a very different constitutional claim, contending that, **as applied** to the three issue ads dated July 15, 2004, BCRA's Title II definition does not draw a constitutionally defensible line between genuine and sham issue ads. *See* WRTL Jur. Stmt. at 24-30.

Notwithstanding that (a) WRTL was **not** a party to the McConnell litigation, (b) WRTL's July 2004 issue ads were **not** in evidence in that litigation, and (c) WRTL's as applied constitutional claim was **not** made in that litigation, the three-judge court below dismissed WRTL's constitutional challenge, **not** on the merits, but upon the sole ground that "the reasoning of the McConnell Court leaves **no** room for the kind of 'as applied' challenge WRTL propounds before us." *See* WRTL v. FEC, Order (May 10, 2005); Memorandum and Order (May 10, 2005); and Memorandum Opinion and Order (August 17, 2004) ("Mem. Op."), reprinted in WRTL Jur. Stmt. at 1a, 2a-3a, and 4a-17a. For the reasons stated below, this ruling is patently erroneous.

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[6] Buckley v. Valeo, 424 U.S. 1 (1976).

II. BCRA SECTION 403 AFFIRMATIVELY PROVIDES FOR JUDICIAL REVIEW ON THE MERITS OF WRTL'S CONSTITUTIONAL CLAIM IN THIS CASE.

The ruling of the court below, that this Court's five-person majority holding that BCRA's definition of "electioneering communication" on its face precludes WRTL's constitutional challenge to that definition **as applied**, is breathtaking, both with respect to its foundation and to its implications. The primary basis for its ruling is a footnote wherein the McConnell majority, in explanation as to why it did not reach the constitutionality of a statutory backup definition, stated:

> **We uphold all applications** of the primary definition and accordingly have no occasion to discuss the backup definition. [McConnell v. FEC, 540 U.S. at 190 n.73 (emphasis added). *See* Mem. Op., WRTL Jur. Stmt. at 7a.]

This sentence, coupled with the fact that the majority did not "expressly" state that the primary definition might be subject to an "as applied" constitutional challenge in the future — as it had done with respect to the other facial challenges to BCRA — persuaded the court below to rule that WRTL's as applied constitutional challenge should be dismissed without any judicial review of the merits. *Id.*

At first, the court below appears to have read the footnoted statement literally — that **all** applications of BCRA § 201's definition to ads referring to a candidate for election to federal office broadcast in the future are constitutional. Mem. Op., WRTL Jur. Stmt. at 7a. On closer reading, it appears that it asserted that the McConnell footnote indicates that "some applications of that definition" have been prejudged as

constitutional, and thus, claims challenging them can be dismissed without any adjudication on the merits. *Id.*, Mem. Op., WRTL Jur. Stmt. at 7a. But it does not provide any guidance as to which applications have been prejudged and which ones have not. Instead, it simply ruled by fiat that the "**reasoning** of the McConnell court leaves no room ... for the kind of 'as applied' challenge WRTL propounds before us." *Id.*, Mem. Op., WRTL Jur. Stmt. at 7a. Indeed, in order to explain why the McConnell "reasoning" precluded an adjudication of the WRTL's constitutional claim on the merits, the court below would have had to demonstrate why the McConnell "reasoning" covered the three issue ads before it. To accomplish that goal, the court below, in turn, would have been required to rule against WRTL's claim **on its merits**, not dismiss that claim outright solely on the strength of the McConnell footnote. For that reason alone, the ruling of the court below should be reversed and remanded.

Furthermore, by denying altogether WRTL's opportunity to obtain judicial review **on the merits** of the constitutionality of BCRA's definition of an "electioneering communication" as applied to an issue ad that was **not** before the McConnell Court, the court below failed to read the McConnell decision in light of the "strong presumption that Congress intends judicial review of administrative action." *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). BCRA § 403 contains no express exceptions to its broad conferral of jurisdiction on a three-judge court in the District of Columbia for actions "brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act." But the district court's reading of the McConnell majority footnote created an exception, denying judicial review on the merits of any constitutional claim challenging the application of BCRA § 201's definition that a court concludes is barred by the

McConnell majority's "reasoning."

In effect, the court below interpreted McConnell to have established an exception to the normal rule that the constitutionality of agency action is subject to judicial review, absent "clear and convincing evidence" of the statutory language to the contrary. *See* Weinberger v. Salfi, 422 U.S. 749, 762 (1975). While this rule is normally applied when a court is faced with a statute that could be construed to deny judicial review of actions of an administrative agency, the reason for presuming that a statute does not cut off Article III court review applies equally to an interpretation of a judicial opinion. For example, the court below placed great emphasis upon the fact that the McConnell opinion did not "expressly" state that "as applied" constitutional challenges to BCRA § 201 "would remain available." Mem. Op., WRTL Jur. Stmt. at 7a-8a. According to this Court's decision in Bowen, however, "'[t]he mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.'" Bowen, 476 U.S. at 671.

The same rule governing statutory interpretation should prevail in the reading of a court opinion. Judicial silence on Article III court review no more indicates unreviewability of the constitutionality of action taken by an administrative agency than does congressional silence. To rule to the contrary from the failure of the McConnell Court to expressly preserve as applied constitutional challenges to BCRA § 201 would carve out an exception to BCRA § 403(a) that provides for the comprehensive review of the "constitutionality of **any** [of its] provision[s]," whether on its face or as applied.

This Court has previously characterized the preclusion of judicial consideration of an issue arising from administrative action as "extraordinary, such that 'clear and convincing'

evidence would be required before we would ascribe such intent to Congress, ... but it would have raised a serious constitutional question of the validity of the statute as so construed." Weinberger v. Salfi, 422 U.S. at 762. Likewise here, the three-judge court's "extraordinary" reading of the McConnell footnote and its failure to to expressly reserve as applied challenges to BCRA § 201 raises a serious constitutional question of the validity of the McConnell opinion. After all, the Supreme Court has no such power to limit the jurisdiction of the federal courts. It is for Congress to confer jurisdiction on the courts,[7] not for courts to refuse jurisdiction where conferred absent constitutional justification. *See* Muskrat v. United States, 219 U.S. 346 (1911).

In short, the three-judge court's reading of the McConnell Court's rejection of a facial challenge to BCRA § 201 to preclude an "as applied" constitutional claim **not** raised in McConnell, on facts **not** introduced in McConnell by an entity **not** a party in McConnell, is "fundamentally at odds with the function of the federal courts in our constitutional plan." *See* Younger v. Harris, 401 U.S. 37, 52 (1971). As Justice Black observed, facial attacks on statutes in the courts are the rare exception, because "[t]he power and duty of the judiciary to declare laws unconstitutional [are] ... derived from its responsibility for resolving concrete disputes [wherein] a statute apparently governing a dispute cannot be **applied** by judges, consistently with their obligations under the Supremacy Clause, when such an **application** of the statute would conflict with the Constitution." *Id.* (emphasis added).

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[7] *See* U.S. Constitution, Article I, Section 8, Clause 18 and Article III, Sections 1 and 2, Clause 2. *See also* Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

III. THE READING OF MCCONNELL BY THE COURT BELOW TRANSFORMS THAT DECISION INTO AN UNCONSTITUTIONAL EXERCISE OF JUDICIAL POWER.

A. The Court Below Misread McConnell as a Binding Advisory Opinion.

In Muskrat v. United States, 219 U.S. 346, 349-50 (1911), this Court refused to render a decision on the merits on the ground that the jurisdiction conferred upon the federal courts by Congress was contrary to the limitations on judicial power found in Article III of the Constitution. In support of this ruling, this Court observed that "there was **no general veto power** in the court upon the legislation of Congress" **nor** any "**revisory power** over the action of Congress." *Id.*, 219 U.S. at 357, 361 (emphasis added). Yet, BCRA § 403 invites the judiciary to employ both of these proscribed powers.

By inviting expedited review, BCRA § 403 — like a comparable judicial review provision in the 1996 Line Item Veto Act — shifted the federal courts to the front line of constitutional controversy, (a) facilitating the President's ability to treat judicial review as a substitute for the presidential veto,[8] rather than (b) preserving the federal judiciary's Article III role whereby "'federal courts may exercise power only "in the last resort, and as a necessity."'" *See* Raines v. Byrd, 521 U.S. 811, 819 (1997). Additionally, by granting members of Congress statutory standing to sue, BCRA § 403 invited the Court to exercise "revisory power," subjecting BCRA to the possibility

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[8] *See* Amar and Amar, "Breaking Constitutional Faith: President Bush and Campaign Finance Reform" (Apr. 5, 2002) http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/amar20020405.html.

of "judicial surgery" which could excise portions of the statute before it would ever be enforced.[9] In fact, Congress placed in BCRA § 201's definition of "electioneering communication" — the BCRA provision at issue in the case at bar — a "back up" definition should the primary definition be "held to be constitutionally insufficient by final judicial decision." *See* 2 U.S.C. § 434(f)(3)(A)(ii).

Prior to McConnell, this Court stated that it has "always insisted on strict compliance with [its] jurisdictional standing requirement[,] [a]nd [its] standing inquiry has been especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether action taken by one of the other two branches of the Federal Government was unconstitutional." Raines v. Byrd, 521 U.S. at 819-20. Indeed, in past cases, this Court has generally eschewed the temptation to decide any constitutional issue other than the one specifically before it, taking special precautions in an action challenging a statute on its face, because "the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies **before** the statute is put into effect, is rarely ... ever an appropriate task for the judiciary." Younger v. Harris, 401 U.S. at 52 (emphasis added).

Nevertheless, the three-judge court below read the McConnell majority opinion upholding BCRA § 201 on its face to preclude WRTL's as applied constitutional challenge. By construing McConnell case as having precluded litigation of WRTL's novel constitutional claim based upon new facts, the district court has undermined the essential function of judicial review, transforming the courts into "commissions assigned to pass judgment on the validity of the Nation's laws," instead of

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[9] *See* Amar and Amar, "Breaking Constitutional Faith," *supra*.

places of last resort rendering "[c]onstitutional judgments ... out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *See* Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973). Instead of guarding against reading the McConnell majority ruling as an advisory opinion applicable to constitutional claims of persons not parties to the case on facts not in the record, the district court misread that opinion as an advisory one **binding** upon such parties regardless of the differences in fact and claim. In doing so, the court below violated a cardinal rule of this Court that "[i]t would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when **definite** rights appear upon the one side and **definite** prejudicial interferences upon the other." *See* United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947) (emphasis added).

B. The Court Below Misread McConnell as Having Resolved a Case Not Before It.

The McConnell majority did not examine the question whether any plaintiff had standing to wage a constitutional challenge to BCRA Title II (*see* McConnell, 540 U.S. at 189-212). Yet, one should not yield to the temptation to read its opinion apart from the constitutional principle that "Article III of the Constitution limits 'the judicial power' to the resolution of 'cases' and 'controversies,'" a "bedrock element of which is that plaintiffs must establish that they have standing to sue." McConnell, 540 U.S. at 225 (Rehnquist, C.J., writing for the Court and dismissing several non-Title II claims for lack of standing). Otherwise, one might read the McConnell majority opinion too broadly, just as the district court has done in this case.

Of special importance to this case, the McConnell majority utterly failed to address the question whether members of Congress had standing. To be sure, BCRA § 403(c) had purported to confer such standing, but such statutory conferral in the past has not ensured that such members could, thereby, obtain a judicial decision on the merits of their constitutional claim. Rather, just six years before McConnell, this Court — under a strikingly similar set of provisions expediting judicial review of the controversial Line Item Veto Act on its face — rebuffed Senator Robert Byrd and his five congressional colleagues, concluding that they did not have a sufficiently "personal stake" in the outcome so as to have standing to sue. Raines v. Byrd, 521 U.S. at 818-864. In doing so, this Court "put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and necessity," adhering to a "careful[] inquir[y] as to whether [the members of Congress] have met their burden of establishing that their claimed injury is personal, particularized, concrete and otherwise judicially cognizable." *Id.*, 521 U.S. at 820.

By ruling against Senator Byrd, the Raines Court distinguished between a constitutional claim essentially based "on a loss of political power" and a "private right" (*id.*, 521 U.S. at 821), in recognition of the fact that permitting members of Congress to litigate a constitutional claim in their capacity as the elected representatives of the people runs the risk of premature finality, in which the judicial settlement of a political dispute between contending legislators may spill over into a lawsuit involving personal and concrete legal injury suffered by a constituent in a real case or controversy. *See* Raines, 521 U.S. at 829. And that is exactly what has happened here to WRTL in the court below.

Although Senator McConnell was only one of many

plaintiffs to file a constitutional challenge to BCRA, he and his lawyers dominated the proceedings. Indeed, before the Supreme Court, Senator McConnell's handpicked lawyers argued the cause for all plaintiffs, except the political parties, labor unions and minors. Now, the district court has, in effect, saddled WRTL with that loss, ruling that the McConnell case "upheld the electioneering communication provisions ... in their entirety" (Mem. Op., WRTL Jur. Stmt. at 7a), apparently upon the novel assumption that WRTL's interest was adequately represented by the lawyers designated by the Court to argue for the plaintiff parties in that case.[10]

But our system of judicial review does not accommodate such vicarious representation. *See* Broadrick, 413 U.S. at 610. Indeed, this Court has guarded against resolving political disputes at the request of persons who "wished to act contrary to [the] provisions [of the Hatch Act] ... and desire[d] a declaration of the legally permissible limits of regulation" because they had no "personal stake" in the outcome. *See* United Public Workers v. Mitchell, 330 U.S. 75, 84, 89-91 (1947). As was true of Mitchell, **none** of the plaintiffs in McConnell alleged — nor could have alleged — that they had taken action in violation of BCRA. Rather, as in Mitchell, the plaintiffs in McConnell had alleged that they wished in the future to engage in "political activity" that appeared to be unconstitutionally regulated by BCRA. In Mitchell, this Court refused to entertain a similar facial challenge to the constitutionality of the Hatch Act, finding " the general threat of possible interference with [constitutional] rights ... if specified things are done ... does not make a justiciable case or controversy":

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[10] *See* McConnell, 157 L.Ed.2d at 529.

> Appellants want to engage in 'political management and political campaigns,' to persuade others to follow appellants' views by discussion, speeches, articles and other acts reasonably designed to secure the selection of appellants' political choices. Such **generality of objection** is really an attack on **the political expediency** of the Hatch Act, **not the presentation of legal issues.** It is **beyond the competence of courts to render such a decision.** [*Id.*, 330 U.S. at 89 (emphasis added).]

This excerpt from Mitchell is especially telling when applied to the challenge to the Title II provisions on "electioneering communications." There is no question that the plaintiffs in McConnell generally alleged that they were intending to engage in the composition and broadcast of issue ads in upcoming elections. But no plaintiff could have introduced into evidence WRTL's three ads that are at issue in this case. Rather, the evidence consisted largely, if not exclusively, of studies of issue ads — and actual issue ads — crafted **before** BCRA and, therefore, crafted under the more lax Buckley express advocacy standard. *See* McConnell, 251 F. Supp. 2d. at 227-33, 237-50. In contrast, WRTL's three ads were composed **after** BCRA and, therefore, not "infected" by the previously-prevailing Buckley "magic word" formula. Therefore, the references to a candidate for election to federal office could not be **presumed** to be just a "cover" for a "sham" attack ad.

The McConnell majority's assessment of the facial constitutionality of BCRA's definition of "electioneering communication" focused on past ads, not future ones. Indeed, in addressing the facial attack on BCRA § 201 under this Court's vagueness and overbreadth doctrines, the McConnell

majority made only a single reference to the judicial findings below, namely, that "Buckley's magic-words requirement is functionally meaningless." McConnell, 540 U.S. at 193. In support of that finding, the McConnell majority made only two references to the evidentiary record, one to testimony that "magic words" — like vote for or against — "would seldom [be] cho[sen] ... even if permitted" and another to an ad that, although it did not contain any magic words, "no less clearly intended to influence the election." *Id.*

Having found such evidentiary support to discount the old standard governing electioneering ads, the McConnell majority made no effort whatsoever to determine if the new BCRA standard might be applied unconstitutionally to any ad that would be crafted and broadcast under the new law. Nor did it examine the record to determine whether its two factual findings demonstrate **also** that the lines of demarcation set forth in BCRA § 201 are sufficiently "meaningful [to] distinguish electioneering from a **true** issue ad." *Id.* Indeed, had the McConnell majority even attempted to address that question, it could not have done so as there was no such evidence in the trial record. Thus, the McConnell majority opined that the BCRA definition of "electioneering communication" was constitutional on its face, without knowing how it could be applied to an "issue ad" composed and broadcast after BCRA.

To read the McConnell "reasoning" as having definitively resolved the constitutionality of future applications of BCRA § 201's definition of an "electioneering communication" would not only do violence to the McConnell evidentiary record, but would disregard the McConnell majority's treatment of the old Buckley express advocacy standard. In supporting its rejection of that standard as a broad constitutional one, in favor of one tied to a particular statute, the Court stated that "we have long 'rigidly adhered' to the tenet '**never** to formulate a rule of

constitutional law broader than is required by **the precise facts** to which it is to be applied.'" McConnell, 540 U.S. at 192 (emphasis added). Neglecting this reminder, the district court misread McConnell to accomplish just the opposite, precluding WRTL from presenting a constitutional claim **not** made in McConnell on facts **not** introduced in McConnell by an entity **not** a party in McConnell.

C. The Court Below Misread the Application of the Overbreadth Rule in McConnell.

Plaintiffs' overbreadth challenge in McConnell to BCRA § 201's definition of "electioneering communication" — that it was unconstitutional as applied to an unspecified number of constitutionally-protected issue ads — did not dispense with the jurisdictional requirement that, in order to wage an overbreadth challenge, the plaintiffs must allege and prove a personal injury, or threat of such injury, to themselves. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972). The standing exception in overbreadth cases simply permits a litigant — who otherwise has standing to sue — to **raise** third party constitutional claims, **not to resolve those claims** on the merits against persons not parties to the case. For example, the plaintiffs in Broadrick v. Oklahoma, 413 U.S. 601 (1973), were charged with violating the law. By rejecting their overbreadth challenge, the Court did not rule that the statute was therefore constitutional as applied to others. Rather, it simply ruled that the threat to the constitutional rights of third parties posed by the challenged statute was not "substantial" enough to warrant a decision in favor of a person whose actions are not constitutionally protected. *See* Broadrick, 413 U.S. at 615-16. Nor did the Broadrick Court's "reasoning" foreclose a future as applied challenge. Rather, the Court's reasoning was, as in McConnell, tailored to the facts and constitutional claims made by the parties in the immediate case. *See* Broadrick, 413 U.S.

at 616-18.

The district court, however, misconstrued the McConnell Court's overbreadth decision to have cast a much wider net, not only to catch the "issue ads" before it, but subsequent ones as well. In doing so, the district court gave more than instructive effect to McConnell in a ruling on the merits; indeed, the district court gave McConnell *res judicata* effect. Instead of taking into account the "reasoning" of the McConnell court in relation to the facts therein, and applying that "reasoning" to the new facts presented by WRTL, it lifted that "reasoning" out of the factual context in McConnell and dismissed the case as one that had already been decided. This result could only be reached by a misreading of the overbreadth doctrine.

By making no effort to place the McConnell "reasoning" into any factual setting, the district court engaged in the very kind of abstract decision-making that the Article III, Section 2 limitation upon judicial power was designed to prevent. This Court has employed its "overbreadth doctrine ... sparingly and only as a last resort," because the overbreadth inquiry requires the Court to examine a statute to ascertain whether it "may deter protected speech to some **unknown** extent." *See* Broadrick, 413 U.S. at 613, 615 (emphasis added). By abstracting footnote 73 from the McConnell factual setting, the court below violated this salutary rule, projecting the McConnell Court's reasoning onto an issue ad — the contents and circumstances of which were **unknown** to the McConnell Court — without any comparative analysis of the facts that shaped the McConnell ruling on the facial constitutionality of BCRA's definition of "electioneering communication."

As Justice Hugo Black put it, "the task of analyzing a proposed statute, pinpointing its deficiencies and requiring correction of those deficiencies **before** the statute is put into

effect, is rarely if ever an appropriate task for the judiciary." Younger, 401 U.S. at 52 (emphasis added). While it may be argued that plaintiffs' facial challenge in McConnell to BCRA's definition of "electioneering communication" was one of those rare occasions, it should be remembered that **none** of the plaintiffs in McConnell had been charged with a violation of, or threatened with enforcement of, the provision of BCRA § 201. Even if plaintiffs may raise third-party claims under the overbreadth doctrine, the McConnell majority opinion should be read circumspectly, **not** expansively as the district court did, so as not to extend its "reasoning" beyond the facts of the case to "ill-defined controversies" not then before the Court. *See* Mitchell, 330 U.S. at 91.

IV. THE COURT BELOW MISUSED MCCONNELL TO DENY WRTL'S LIBERTY WITHOUT DUE PROCESS OF LAW.

According to the three-judge court below, the McConnell majority's ruling that BCRA's definition of "electioneering communication" was constitutional on its face foreclosed WRTL's opportunity to show that definition to be unconstitutional as applied to three specified issue ads. Mem. Op., WRTL Jur. Stmt. at 7a-8a. In partial support of its claim, WRTL cited a recent FEC ruling that the broadcast of a car dealer's ad referring to the car dealer's name is not governed by section 201 of BCRA, even though the ad clearly referred to the car dealer who was at the time a candidate for election to federal office. WRTL Jur. Stmt. at 2. Additionally, the FEC has addressed other issues respecting the scope and application of the electioneering communication rules to documentaries, documentary films, and broadcast ads for such films, ruling that section 201 of BCRA does not apply to certain documentaries, but does apply to others, and that section 201 does apply to advertisements for all documentaries. *See* FEC Advisory

Opinion 2004-30. If the district court's ruling stands, it may very well leave future constitutional challenges to the application of BCRA § 201's definition of electioneering communication unheard by any federal court, establishing the FEC as the final arbiter regarding the constitutionality of its own actions.

A. McConnell Adjudicated the Issue that BCRA's Definition of Electioneering Communication Was Constitutionally Justified Against a Facial Attack.

As discovery got underway in McConnell v. FEC, the proceedings quickly took the form of a legislative hearing, rather than a pre-trial proceeding. In fact, as the discovery process unfolded, it resembled the battle between the proponents and opponents of BCRA as it had unfolded in the Congress. By the time that the parties completed the extensive discovery process,[11] it became abundantly clear that the litigation focused on whether the provisions of BCRA were constitutionally **justified**, **not** whether the provisions of BCRA would be constitutional in all their varied **applications.** *See* McConnell v. FEC, 251 F. Supp. 2d at 220, 233-265.

On appeal, the policy nature of the district court's proceedings became even more pronounced. For example,

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[11] Utilizing a streamlined discovery process, with depositions replacing live testimony, the three-judge McConnell court developed a "paper" trial record, dispensing with the examination of witnesses in open court. By the time oral arguments were scheduled in December 2002, briefs totaling 1,676 pages and proposed findings of fact coming to 576 pages were submitted to the court, along with "forty-one boxes (plus thirteen additional binders), which by conservative estimation comprised the testimony and declarations of over 200 fact and expert witnesses and over 100,000 pages of material." McConnell v. FEC, 251 F. Supp. 2d at 208-09.

rather than opening its opinion with the traditional statement of the case before it — including identification of the contesting parties, a summary of the salient facts, the disposition of the court below, and the scope of review governing the case — the McConnell majority began with a historical reference to the "opinion" of a single person that unregulated "political contributions by corporations" was "'a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions,'" immediately followed by the undocumented assertion that this one man's "judgment" has been endorsed by the "Congress of the United States [with] repeatedly enacted legislation," the latest being BCRA. *See* McConnell v. FEC, 540 U.S. at 115. From this tendentious beginning, the McConnell majority continued: (a) tracing the history of congressional legislation; (b) charting a path of progressively tighter and tighter federal reins on contributions and expenditures of money in political campaigns; (c) noting "its steady improvement of the national election laws" with the enactment of the Federal Election Campaign Act of 1971 and its 1974 amendments; and (d) observing this progression to have culminated with the enactment of BCRA. *See id.*, 540 U.S. at 115-17.

After this brief account of the history of campaign finance regulation, the McConnell majority launched into a "commentary" on the three "important developments [that] persuaded Congress" to enact BCRA: (a) the "solicitation, transfer, and use of **soft money** [that] enabled parties and candidates to **circumvent** FECA's limitations on the source and amount of contributions in connection with federal elections" (*id.*, 540 U.S. at 118-126 (emphasis added)); (b) the use of "**soft money**" to air "**[s]o-called issue ads** ... without disclosing the identity of, or any other information about, their sponsors" (*id.*, 540 U.S. at 125-126 (emphasis added)); and (c)

the 1998 Senate Committee on Governmental Affairs report that the "'**soft-money loophole**' had led to a 'meltdown' of the campaign finance system." *Id*, 540 U.S. at 129 (emphasis added).

Remarkably, the McConnell majority substituted this "commentary" for what ordinarily would have been a statement of the facts of the case. To be sure, it supported its commentary by footnoted references to the opinions of the three judges of the district court below, but the McConnell majority made no effort to make sure that the facts supporting its commentary could be found in the *per curiam* decision below, or in at least the opinions of two of the three judges below, as contrasted to the opinion of only one of the three trial judges, or no opinion at all. *Compare* footnotes 7, 8, 22, 23 (*per curiam*) 14, 15, 16, 17, 18, 19, 20, 21 (two or more judges) *with* footnotes 9, 10, 24, and 25 (Judge Kollar-Kotelly) and footnotes 11 (Mann Expert Report), 13 (Declaration of Gerald Greenwald, and Brief for Committee for Economic Development as Amici Curiae), and 26-37 (Senate Report No. 105-167 (1998)). Indeed, the McConnell majority elevated the testimony of a single senator — citing to the Senate Report over the trial record — as having "provided overwhelming evidence that the **twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws.**" McConnell, 540 U.S. at 126 (emphasis added).

When the McConnell majority turned its attention to the constitutionality of BCRA § 201, it limited its inquiry **solely** to the question whether, in light of the historical record of past legislation, the Buckley express advocacy rule was constitutionally mandated. *See* McConnell, 540 U.S. at 189-95. Concluding that the statutory language at issue in Buckley and the Buckley Court's reasoning demonstrated otherwise, the McConnell majority considered the claim of facial invalidity to

be conclusively resolved. *Id.* at 192-95. In so ruling that the McConnell majority did not adjudge the constitutionality of the BCRA § 201 definition "in [its] entirety," as the district court concluded. *See* Mem. Op., WRTL Jur. Stmt. at 7a. It certainly made no attempt to adjudicate the constitutionality of that definition by any standard other then the old Buckley express advocacy standard.

To be sure, the McConnell majority did write in footnote 73 that "[w]e uphold **all applications of the primary definition** and accordingly have no occasion to discuss the backup definition." 540 U.S. at 190 n.73. But that language should not be construed to mean that, by rejecting the facial attack upon BCRA § 201's primary definition of "electioneering communication," the McConnell majority had resolved that the definition would be constitutional as applied to any ad — even one not in the McConnell evidentiary record — that "refers to a clearly identified candidate for federal office." *See* Mem. Op., Jur. Stmt. at 6a-7a.

Such a reading of the McConnell majority opinion turns the doctrine of overbreadth on its head by, in effect, granting standing to a party to contest the application of BCRA § 201 to a third party "to some unknown extent,"[12] and then denying standing to a third party, the first party having failed to convince the McConnell majority that the statute was overbroad. Instead, as the Broadrick Court clearly acknowledged, when a party fails to satisfy the burden of demonstrating substantiality, then "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanction may, assertedly, not be applied." Broadrick, 413 U.S. at 615-16.

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[12] *See* Broadrick, 413 U.S. at 615.

WRTL appears to have attempted to make just such a case in the court below, but the three-judge district court disallowed it, asserting that the McConnell majority's ruling foreclosed any judicial review on the merits of WRTL's constitutional claim. Yet, the three-judge court pointed to nothing in the McConnell majority opinion indicating why the normal rule of case-by-case adjudication, as described in Broadrick, would not apply.

B. The District Court's Failure to Follow the Broadrick Rule Denied WRTL Its Liberty Without Due Process of Law.

The district court's decision dismissing WRTL's constitutional challenge without reaching its merits permits the FEC to exercise judicially unreviewable discretion to resolve WRTL's constitutional objection to the application of that definition to its three ads and, presumably, to any other issue ad which refers clearly to a candidate for election to federal office. Such constitutional deference to an administrative agency is unprecedented.

In Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986), this Court has affirmed the right of judicial review of executive action, citing Chief Justice Marshall who wrote:

> "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right ... between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to the debtor no remedy, no appeal to the laws of his country, if

> he should believe the claim to be unjust." [*Id.*, 476 U.S. at 670.]

From this quotation in Bowen, administrative law experts, Professors Alfred C. Aman, Jr. and William T. Mayton, have inferred that "[u]nder Article III and in a government of separated powers, the general and undiminished function of the courts is to assure that agencies conform to the Constitution ...." A. Aman and W. Mayton, Administrative Law 362 (West Group, St. Paul: 2001). Further, Professors Aman and Mayton have written that "[t]he unconstitutionality of absolute preclusion of judicial review may be deduced from the courts' function, under *Marbury v. Madison*, of assuring that government in all its parts operates within constitutionally prescribed limits." *Id.* at 362, n. 14. *See also* Ralpho v. Bell, 569 F.2d 607, 620, *reh'g denied*, 569 F.2d 636 (D.C. Cir. 1977).

In light of these principles, this Court has stated that it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." Leedom v. Kyne, 358 U.S. 184, 190 (1958). As demonstrated in Argument I above, Congress has clearly granted access without exception to the courts to test the constitutionality of any provision of BCRA. *See* BCRA § 403. The district court's reading of McConnell, carving out an exception for certain as applied constitutional challenges to BCRA's definition of electioneering communication, flies in the face of that grant of jurisdiction. And, if sustained, it would deny WRTL of its liberty without due process of law, having denied to WRTL access to the very department established by the Constitution to "say what the law is." Marbury v. Madison, 5 U.S. 167, 179 (1803). If due process of law means anything, it means that a right secured by the United States Constitution — the supreme law of the land — cannot be denied by an

administrative agency in its unreviewable discretion.

CONCLUSION

For the foregoing reasons, the district court's dismissal of WRTL's complaint should be reversed.

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Supreme Court of the United States

WISCONSIN RIGHT TO LIFE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF A COALITION OF PUBLIC CHARITIES, AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF THE *AMICI CURIAE*

Amici[1] are thirty-five public charities, tax-exempt under section 501(c)(3) of the Internal Revenue Code. Individual organizations' Statements of Interest are presented below.

A. OMB Watch

OMB Watch is the operating name of Focus Project, Inc., a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code. Its goal is to promote government accountability and citizen participation in public issues. It is guided by the belief that improving access to governmental decision-makers and energizing citizen participation will lead to a more just, equitable and accountable government, and a stronger society.

OMB Watch's primary focus areas are the federal budget; nonprofit advocacy; government transparency and accountability; and legislation and regulations impacting economic justice, health, safety, and the environment. OMB Watch has a 17-person staff and a $1.7 million annual budget. On this modest budget it has had a significant impact. Over the years, it has played a leadership role on important federal policies, including regulatory reform measures, balanced budget constitutional amendments, and the repeal of the estate tax. Roughly ninety percent of its revenue comes from foundations, often in the form of project grants.

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[1] This brief is filed with the consent of all parties, as indicated by letters of consent filed with the Court. No counsel for a party authored this brief, in whole or in part. No person or entity other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In order to be effective, OMB Watch must react quickly and flexibly to emerging policy debates. Changing congressional goals require it to shift from planned agenda items to unplanned ones. It often works through coalitions, and it places a high value on bridging the gap between Washington and the grassroots level, and energizing citizens at the community level. The coalitions OMB Watch leads connect it to scores of umbrella groups and national membership associations. They, in turn, distribute OMB Watch's materials to thousands of their respective constituents around the country.

When choosing how it will communicate, OMB Watch along with its coalition partners must select means of communication that are suitable to the task. For example, if the House of Representatives or the Senate unexpectedly schedules a vote of importance, time does not always allow for a direct mail or telephone campaign. Broadcast advertising may be the only way to influence the debate.

OMB Watch and its coalition partners of nonprofit organizations take advantage of free and paid media efforts to spread their messages. If they cannot afford to pay for television or radio advertisements, they rely on the broadcasters' willingness to provide unpaid access. Access is provided consistent with the broadcasters' legal obligation to operate in the public interest. OMB Watch and its coalition partners also hold press conferences or other informational events, some of which are covered by C-SPAN or local public interest channels.

As a public charity, OMB Watch does not and cannot use these occasions to intervene in political campaigns. Nevertheless, in the course of a typical broadcast there will be regular references to clearly identified officeholders who may also be candidates for federal office. Indeed, it is

impossible for OMB Watch to avoid referring to federal candidates, given that the key decision-makers on the issues it seeks to affect are almost always qualified as candidates under federal campaign finance law. Almost invariably, the sponsor of the legislation discussed or the executive who has initiated the policy debate is also a federal candidate.

Because OMB Watch is a public charity, it does not have the option of speaking through an affiliated political committee. As a result, due to the electioneering communication restrictions, it has only two choices: stay silent or risk prosecution.

B. Independent Sector

Independent Sector ("IS"), a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code, is the leadership forum for charities, foundations, and corporate giving programs committed to advancing the common good in America and around the world. Its nonpartisan coalition leads, strengthens, and mobilizes the charitable community in order to fulfill its vision of a just and inclusive society of active citizens, vibrant communities, effective institutions, and healthy democracy. Independent Sector's membership of 500 organizations collectively represents tens of thousands of charitable groups serving every cause in every region of the country, as well as millions of donors and volunteers.

IS serves as the premier meeting ground for the leaders of America's charitable and philanthropic sector. Since its founding in 1980, IS has sponsored ground-breaking research; fought for public policies that support a dynamic, independent sector; and created resources so staff, boards, and volunteers can improve their organizations and better serve their communities. IS fulfills its mission by convening

sector leaders to work together on key issues; promoting policies that enable the charitable community to engage with public officials on a nonpartisan basis; supporting the development and dissemination of strategies to strengthen volunteering, voting, giving, and other forms of citizen engagement; encouraging the sector to meet the highest standards of ethical practice and effectiveness; and serving as the voice of the charitable community to the media, government, business, and international voluntary communities.

IS is currently engaged in a broad range of public policy issues ranging from federal and state regulation of charitable organizations, federal tax and spending policies, federal tax incentives for charitable giving, and protecting the advocacy rights of nonprofit organizations. The majority of its members are 501(c)(3) organizations that may not participate in, or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, but these organizations frequently engage in advocacy efforts to inform public policy debates on issues that affect their constituents' and their ability to fulfill their charitable purposes.

These advocacy efforts at times include communications with elected officials in their current capacity as representatives of the people, whether or not they are, at the same time, candidates for federal office. Organizations cannot predict or control the timing of when an issue will be considered by public officials. Some of IS's member organizations, for example, are concerned about the possibility of estate tax repeal because of the negative effect that would have on charitable giving. Their ability to encourage the public to contact their elected officials about a pending vote on the estate tax would be curtailed if the vote was scheduled during an election period. IS members may find it necessary to run ads asking a local official to keep a

particular shelter open, even though the official is also a candidate for federal office. IS members have called on the public to contact their congressional representatives about pending votes that affect the funding and eligibility requirements for specific government programs related to charitable purposes ranging from human services to health to the arts.

C. Independence Institute

The Independence Institute is a 501(c)(3) educational organization, founded in 1985. Located in Colorado, it is a state-based think tank. The Independence Institute is established upon the eternal truths of the Declaration of Independence. The Institute is a non-partisan, non-profit public policy research organization dedicated to providing timely information to concerned citizens, government officials, and public opinion leaders. The Independence Institute is involved in local, state, national, and international issues.

Much of the Institute's work is carried out through several Centers which are part of the Institute: the Education Policy Center, the Health Care Policy Center, the Second Amendment Project, the Center for the American Dream, the Campus Accountability Project, and the Fiscal Policy Center. The work of all these Centers often intersects with policy questions being debated by Congress.

The Independence Institute communicates with the public in a very broad variety of ways: through newspaper articles, television and radio programs, books, law review articles, presentations at scholarly conferences, legislative testimony, e-mail, podcasts, long monographs, and shorter research papers. For many years, the Independence Institute has also communicated with the public through radio advertising, one

of the communications media which is censored by the speech restrictions enacted by Congress in 2002.

Radio advertising is a very important part of the Independence Institute's educational mission. The Institute's other means of communications (such as research papers and newspaper op-eds) are certainly important, but they reach only a small fraction of the public – a relatively elite fraction that already has a high pre-existing interest in policy questions. In contrast, radio advertising allows the Institute to communicate with a much broader group of the public. Such advertising allows the Institute to share its ideas with hundreds of thousands or millions of people whom, as a practical matter, the Institute has no other capacity to reach. Significantly, radio advertising allows the Institute to present its ideas in their purest form – without the limitations (and, sometimes, distortions) of those ideas being rephrased or selectively quoted by a reporter.

The speech restrictions imposed in 2002 chill the Independence Institute's ability to communicate with the public about important federal questions during the thirty and sixty days censorship periods. The Independence Institute has no desire to advocate for the election of federal candidates (or, for that matter, state and local candidates). In twenty years, the Independence Institute has never done so. The Independence Institute has a perfect record of compliance with all federal, state, and local laws against candidate advocacy by non-profit organizations. Indeed, because the Independence Institute is founded to advance particular ideas – namely the eternal truths of the Declaration of Independence, as applied to contemporary concerns – we will often praise a particular Congressperson one week (such as for voting against pork-barrel spending), and criticize the

same Congressperson the next week (such as for supporting restrictions on a Bill of Rights freedom).[2]

SUMMARY OF ARGUMENT

The "electioneering communication" restrictions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 166 Stat. 81, 91 (codified at 2 U.S.C. § 441b(c)), cannot constitutionally be applied to 501(c)(3) charities like *amici*. Sections 203 and 204 of BCRA were designed to prevent "sham issue ads." Yet *amici* are, by definition, nonpartisan and nonpolitical organizations. They cannot intervene in a political campaign without violating the law.

Moreover, unlike the corporations whose sham ads Congress sought to curb, charities like *amici* do not enjoy the alternative of establishing federally-registered political committees ("PACs") to engage in political spending. The availability of a PAC spending option was a critical consideration for this Court in upholding the electioneering communication restrictions in *McConnell v. FEC*, 540 U.S. 93, 206 (2003), just as it was when the Court upheld the statute under challenge in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 670 (1990). Yet this option does not exist for charities like *amici*. The district court suggests that the severity of the injury to Appellant's free speech interest is allayed because it can speak freely through its separate segregated political fund. Public charities find no comfort in this suggestion; their nonpartisan voices are targeted for silence.

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[2] Additional Interests of Amici are included in the Appendix to this brief.

Finally, section 501(c)(3) organizations, unlike for-profit corporations, are not in a position to use vast resources accumulated in the commercial marketplace to dominate the political debate. Quite to the contrary, section 501(c)(3) organizations often serve as a counterweight to the immense resources that corporations expend to influence government policy.

Neither of the justifications relied upon by the Court in *McConnell* to uphold the electioneering communication restrictions is present here. There is no record to support a claim that the activities of these organizations have led to corruption of government officials. Nor is there any evidence that the grassroots lobbying efforts of public charities distort the political process. Public charities have not been, and are not plausibly considered, vehicles for corporate circumvention of our election laws. The application of the electioneering communication restrictions to the legitimate grassroots lobbying of public charities is unsupportable.

Rather than corrupting or distorting our democracy, public charities enhance it. They bring voices to the deliberations of government that otherwise might not be heard. If their communications pose a threat to the integrity of our government, it has not been demonstrated. Indeed, the very transparency and accountability of governmental processes depend on untrammeled speech on public policy by organizations like *amici*.

The First Amendment guarantees their right to speak, subject to the rules that already exist to prohibit and penalize political intervention by them. In considering whether Appellant is entitled to a grassroots lobbying exception, this Court should ensure that any legal restrictions on such lobbying cannot be applied in a manner that would deny

public charities their First Amendment right to petition their government.

ARGUMENT

A. Nonprofit Lobbying Is Protected by the First Amendment

"Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. This right is "implicit in '[t]he very idea of government, republican in form.'" *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it." 1 BLACKSTONE'S COMMENTARIES editor's app. at 297 (St. George Tucker ed., Philadelphia, Birch & Small 1803), *quoted in New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Goldberg, J., concurring in result).

Nowhere is the right to petition more deeply implicated then when a representative body insulates itself from the opinions of those it represents. Measures that have the effect of silencing the public voice precisely at the time legislation is being considered are, as Blackstone suggests, a threat to the very concept of popular sovereignty. If the right to petition is to have meaning, it needs to find expression on those occasions.

This Court has consistently held that the right to petition applies equally to all branches of government. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510

(1972). This Court has recognized that "the First Amendment protects the right of corporations to petition legislative and administrative bodies." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978). The First Amendment protection of lobbying is even more powerful when the goals sought are political rather than economic. *See Or. Natural Res. Council v. Mohla*, 944 F.2d 531, 535 n.3 (9th Cir. 1991).

Grassroots lobbying efforts conducted by nonprofit corporations fall squarely into the protection offered by the right to petition. The lobbying campaigns restricted by 2 U.S.C. § 441b(c) are speech campaigns directed at legislative and executive officials and designed to influence the shape and direction of public policy as specific governmental measures or actions are considered. The lobbying causes championed by section 501(c)(3) organizations are used to bring light to otherwise little-known issues, and to mobilize the public on issues of national public importance. Lobbying is at the heart of the activity protected by the First Amendment.[3] The right to petition is in essence a right to be heard and it is that right that *amici* seeks to preserve.

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[3] "[The right of petition] would seem unnecessary to be expressly provided for in a republican government, since . . . [i]t is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen." 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 645 (5th ed. 1891).

B. The Electioneering Communication Restrictions Uniquely Burden Section 501(c)(3) Organizations

1. The Electioneering Communication Restrictions Are Broad

The electioneering communication restrictions cut a broad swath through otherwise permissible lobbying by section 501(c)(3) organizations. In practice, they criminalize all broadcast references to a "clearly identified candidate," even if the context is not electoral. *See* 2 U.S.C. § 434(f)(3)(i). The Federal Election Commission ("FEC") regulations make clear that "clearly identified" includes such innocuous references as "your Congressman." 11 C.F.R. § 100.29(b)(2). Indeed, even a reference to the popular name of legislation that includes a candidate's name, such as "McCain-Feingold," would count as a clear reference. *See* Electioneering Communications, 67 Fed. Reg. 65,190, 65,202 (Oct. 23, 2002).

The FEC limited the reach of the ban to broadcast communications for a fee. *See* 11 C.F.R. § 100.29(b)(3)(i). This limitation was challenged, and the United States District Court for the District of Columbia found the exemption to be inconsistent with the plain meaning of the statute. *See Shays v. FEC*, 337 F. Supp. 2d 28, 129 (D.D.C. 2004). The FEC appealed, and the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision. *Shays v. FEC*, 414 F.3d 76, 109 (D.C. Cir. 2005). As a consequence, any reference made to a candidate in a public service announcement or over a public access channel is now subject to the electioneering communication restrictions. The only remaining exemption is for references made by a qualified press entity during the course of a news story, commentary or editorial. Nine states have gone even

further than the congressional prohibition and created electioneering communication laws that reach forms of communications other than the broadcast medium.[4]

Because section 501(c)(3) organizations pose no constitutionally cognizable threat to the governmental interests targeted by the electioneering communication restrictions, the FEC originally granted them a blanket exemption from the rules. *See* 11 C.F.R. § 100.29(c)(6). However, last year the United States District Court for the District of Columbia found that this exception violated the Administrative Procedures Act.[5] *See Shays*, 337 F. Supp. 2d at 127. The FEC did not appeal this portion of the district court's decision and is proposing rules that would cover communications by section 501(c)(3) organizations.

The holding of the district court in this case, coupled with the developments in the *Shays* litigation, suggests that the FEC has very little authority to protect 501(c)(3) activities.

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[4] *See* ALASKA STAT. § 15.13.400(5); COLO. CONST. ART. XXVIII, § 2(7); FL. STAT. § 106.011(18); HI. CODE R. § 11-207.6; IDAHO CODE ANN. § 67-6602(f); 10 ILL. COMP. STAT. 5/9-1.14; OKLA. STAT. tit. 74, § 257:1-1-2; WASH. REV. CODE § 42.17.020(20); W. VA. CODE § 3-8-1A(10); *see also* GUAM CODE ANN. tit. 3, § 19112.1.

[5] The District Court's decision puts the FEC in a difficult position. Because the FEC may not provide a blanket exemption for section 501(c)(3) organizations and may only exempt communications that do not promote, attack, support or oppose a candidate, the FEC will need, for example, to examine the content found on cable channels devoted to religious broadcasting. A reference to a candidate in a religious program or a candidate's appearance during a broadcasted service in the electioneering blackout period would be covered by the ban.

The district court in this case said that Appellant's proposed advertising "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." (Mem. Op. 6.) Implicit in the district court's decision is the conclusion that Appellant's proposed ad attacked Senator Feingold and therefore could not be exempted. If Appellant's ads, seemingly neutral in content, crossed the line, then it is hard to imagine a 501(c)(3) lobbying ad that the FEC could *ever* exempt. Unless the Court weighs in, the FEC will be compelled to give the broadest reading to the statute. No incorporated section 501(c)(3) organization could ever confidently make an electioneering communication.[6]

The FEC's hands appear to have been judicially tied. The agency is no longer able to give meaningful relief to section 501(c)(3) organizations. Under the decision of the court below, it is poised to interpret the ban broadly to cover all direct advertising and public service announcements offered by section 501(c)(3) organizations, however neutral in content. And if the district court's characterization of Appellant's ads is correct, the FEC will likely need to examine the motives of the speaker before allowing an ad. Thus, the FEC, even if it were disposed to do so, could not grant the relief that Appellant seeks and *amici* support.

The district court held that the last remaining source of relief – a constitutional as-applied challenge to the electioneering communication restrictions – is no longer

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[6] In fact, in rules recently proposed by the agency, the FEC is considering, among other approaches, a requirement that any 501(c) grassroots lobbying avoid language that could be construed to "promote, attack, support or oppose" a federal candidate. Under the law, as under the proposed rules, there is no definition offered for this term.

available. (Mem. Op. 4.) In so holding, it relied on *McConnell*, which upheld "all applications of the primary definition [of electioneering communications]." 540 U.S. at 190 n.73. This holding misstates *McConnell*, and leaves both Appellant and *amici* in an unconstitutional bind. This Court also held that "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *Id.* at 206 n.88. If the district court's decision is affirmed, this Court would be foreclosing the ability to vindicate a right that this Court suggests *amici* may well enjoy. To deny parties access to the courts under those circumstances, when the very right at stake is the right to petition the government, is an irony the Constitution cannot indulge.

2. Section 501(c)(3) Organizations Cannot Comply with the Restrictions by Speaking Through Separate Segregated Funds

One of the rationales that this Court used to uphold 2 U.S.C. § 441b(c) is that corporations and unions could pay for otherwise covered advertisements through their PACs. *See id.* at 206. Yet section 501(c)(3) organizations are prohibited from establishing such PACs, because of their inability to participate in partisan activity. *See* I.R.C. § 501(c)(3); *see also* J.E. Kindell & J.F. Reilly, *Election Year Issues*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM 335, 344 (2002).

The effect is to single out section 501(c)(3) organizations for silence. The irony could not be greater. Organizations prohibited from partisan political intervention as a condition of their tax status, and that have presented no evidence of sponsoring "sham issue ads" are left with no access to the airwaves during the thirty and sixty day "blackout periods."

Meanwhile, the very corporations and unions that Congress saw as evading the campaign finance laws remain able to sponsor broadcast advertisements through their PACs. This is constitutionally untenable.

C. The Justifications that Led Congress to Pass the Electioneering Communication Restrictions, and This Court to Uphold Them, Do Not Apply to Section 501(c)(3) Organizations

1. Section 501(c)(3) organizations cannot intervene in elections

Section 501(c)(3) organizations like *amici* must apply to the Internal Revenue Service ("IRS") for approval of their status. *See* I.R.C. § 508(a). In order to gain approval as a section 501(c)(3) entity, and to have contributions be deemed tax-deductible by the contributors, *see id.* § 170(a)(1), the organization must prove to the IRS that it can meet the organizational and operational limitations under section 501(c)(3). *See generally* Treas. Reg. § 1.501(c)(3)-1.

Though section 501(c)(3) organizations face a host of statutory and regulatory restrictions on their behavior, two are important for purposes of applying the electioneering communication restrictions.

First, section 501(c)(3) charities must "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3); *see also id.* § 170(c)(2)(D). This ban is absolute; there is no *de minimis* or insubstantial amount of political intervention that is permissible. Organizations that engage in any political intervention at all risk their status under section 501(c)(3). Moreover, in 1987, Congress amended the Internal Revenue Code to provide for fines against the

individuals in a section 501(c)(3) organization who approve expenditures for political purposes. *See id.* § 4955.

The IRS defines "political intervention" broadly. The term is not limited to merely expressly advocating the election or defeat of candidates, nor even to the promotion, support, attack or opposition of candidates; instead, the IRS examines the facts and circumstances of the activity at issue. *See, e.g.*, *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000); *Christian Echoes Ministries, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied* 414 U.S. 864 (1973). The context of the activity is weighed alongside the activity itself; communications that would alone be considered lobbying can become impermissible political intervention if conducted in a context of partisanship. *See* E. Kingsley & J. Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV 55, 69 (2004).

Second, while section 501(c)(3) organizations can and do engage in grassroots lobbying, they are limited in the extent to which they may do so. "No substantial part" of the activities of section 501(c)(3) organizations may be attempts to influence legislation. I.R.C. § 501(c)(3). The amount of permitted lobbying varies, depending on whether the organization has elected to proceed under the expenditure test, or whether it is subject to the default "substantial part" test. *See id.* § 501(h); *id.* § 4911(c); Treas. Reg. § 1.501(h)-1(a). Either way, a section 501(c)(3) organization cannot devote a large portion of its activities to lobbying, including both the direct lobbying of officeholders and indirect

"grassroots" lobbying.[7] For organizations electing the expenditure test, the IRS imposes fines for lobbying in excess of the prescribed limits. *See id.* § 4911. Violation of the terms of either the substantial part test or the expenditure test can lead to the revocation of an organization's tax-exempt status.

Thus, section 501(c)(3) organizations cannot legally function as vehicles to distort the political process, or to serve as agents of officeholder corruption, even in the absence of the electioneering communication restrictions. Public charities are severely limited in even the amount of lobbying they can conduct; and they are strictly forbidden to engage in any political intervention.

2. The legitimate lobbying efforts of section 501(c)(3) organizations pose no risk of corruption or evasion

There are two potential justifications for the government regulation of political speech: "corruption or the appearance of corruption," *McConnell*, 540 U.S. at 179; and "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form," *see Austin*, 494 U.S. at 660, *quoted in McConnell*, 540 U.S. at 205. Neither of these justifications applies to bona fide lobbying by section 501(c)(3) organizations.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court found that independent political expenditures do "not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign

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[7] Private foundations are even more restricted; they cannot engage in any lobbying activities at all. *See* I.R.C. § 4945(d)(1).

contributions." *Id.* at 46. Lobbying efforts pose even less of a danger. Because of the Internal Revenue Code's restrictions on political intervention, and because of the Federal Election Campaign Act's restrictions on coordination, *see* 2 U.S.C. § 441a(a)(7), a section 501(c)(3) organization cannot distribute lobbying communications in conjunction with candidates or political parties. No candidate or political party may request or suggest the communication; may be materially involved in the communication; may have a substantial discussion with the sponsor regarding the communication; or may use a common vendor or former employee to coordinate the communication. *See* 11 C.F.R. § 109.21. The *Buckley* rationale is simply not implicated in legitimate grassroots lobbying by public charities; such groups lack the motive and opportunity to corrupt. If unlimited independent spending by a political committee does not pose sufficient risk of corruption to justify regulation, then certainly the limited grassroots lobbying of a public charity must provide less.

Nor is the *Austin* rationale implicated. Unlike for-profit corporations, section 501(c)(3) organizations cannot accumulate commercial wealth to dominate the political debate. Their resources must be devoted to public purposes. The idea that commercial corporations are likely to use public charities to circumvent the electioneering communication restrictions is the product of imagination, not experience.

There is no evidence that genuine lobbying will serve as a vehicle for the use of corporate funds to promote corporate "political ideals." *McConnell*, 540 U.S. at 205. Unlike "sham issue ads," which this Court found to be the "functional equivalent" of express advocacy, legitimate lobbying efforts are not "intended to influence the voters' decisions." *See id.* at 206. There is no evidence that section

501(c)(3) organizations produce the "bogus issue advertising" that was the focus of the electioneering communication restrictions. *See id.* at 129. Indeed, the evidence Congress compiled regarding "sham issue ads," on which this Court relied heavily in upholding the electioneering communication restrictions, gave no hint that genuine charitable grassroots lobbying was a threat. *See id.* at 126-32. Congress was concerned about the sorts of advertisements that section 501(c)(3) organizations cannot legally sponsor – those that mimicked the form and content of lobbying advertisements, but were actually crafted to intervene in elections by turning voters against candidates. *See id.* at 129.

There was and remains good reason to believe that other laws effectively deter section 501(c)(3) organizations from engaging in sham issue advertising. The legislative record is devoid of facts that would suggest a different conclusion. Congress simply produced no evidence that grassroots lobbying by public charities was a source of legislative concern. Similarly, the FEC found no evidence during its rulemaking that suggests sham issue ads sponsored by 501(c)(3) organizations are a problem. *See* 67 Fed. Reg. at 65,200.

3. Legitimate lobbying efforts are an important part of a charitable mission

Seventy-eight percent of section 501(c)(3) organizations participate in policy debates through grassroots lobbying, according to a survey of over 1,700 section 501(c)(3) organizations conducted by OMB Watch in 2002. While some lobbying efforts are ongoing efforts, more often they are deployed quickly to respond to unanticipated legislative developments. These campaigns depend on speed and

timeliness. To require them to stop during the sixty days before a general election would render them ineffective.

The blackout periods for electioneering communications create an additional problem. Legislators and lobbyists can easily take advantage of the blackout to enact legislation hostile to nonprofit organizations' interests, knowing that the nonprofit community will have difficulty mobilizing public opposition. Underscoring this concern is the longstanding practice of Congress of appending controversial riders to appropriations bills that are considered in the sixty day period before the general election.

D. The Electioneering Communication Restrictions Cannot Constitutionally Be Applied to Legitimate 501(c)(3) Lobbying

The electioneering communication restrictions cannot constitutionally be applied to the legitimate grassroots lobbying in which public charities may engage. In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), this Court held that the corporate expenditure prohibition of 2 U.S.C. § 441b cannot be applied to certain nonprofit corporations. It relied on the organizational structure of the nonprofit corporation in that case, and found that its structure "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* at 264.

Just as the characteristics of an MCFL corporation keep section 441b from being constitutionally applied to its activities, the characteristics of a section 501(c)(3) organization keep the electioneering communication restrictions from being constitutionally applied to its legitimate grassroots lobbying. The strict prohibition on political intervention and the harsh limits on the amount of

lobbying – backed both by fines, and by the ultimate penalty of tax-exempt revocation – make it impossible for section 501(c)(3) organizations to serve as conduits for impermissible political expenditures. Moreover, an entity cannot simply assert section 501(c)(3) status; the government must affirmatively grant it after an arduous application process, and can revoke it at any time.

It is essential for this Court to acknowledge this limit on the scope of the electioneering communication restrictions. The FEC's attempt to completely exempt section 501(c)(3)s from the electioneering communication restrictions has now been overturned on statutory grounds. *See Shays*, 337 F. Supp. 2d at 127. If the law continues to be understood to apply to 501(c)(3) lobbying, then charities will be singled out for silence, while for-profit corporations, unions and even so-called "527s" will enjoy opportunities to speak over the airwaves during the thirty and sixty day windows.

E. Public Charities Must Have Flexibility to Conduct Their Grassroots Lobbying Activities

Even in the absence of an absolute exception for all grassroots lobbying by section 501(c)(3) organizations, the Constitution compels ample space for these kinds of communications. The First Amendment also forbids any requirement that public charities use segregated individual funds to speak during the electioneering communications periods.

1. The Constitution commands more space for charitable grassroots activity than the law on its face would allow or than the government concedes

There are times in which legitimate lobbying campaigns detail the current, tentative stance of a legislator, or his or her

past record on an issue. Such details are sometimes necessary to explain the immediacy of an issue to the public.[8] Stripped of this detail, effective advocacy is reduced to a whimper. Section 501(c)(3) organizations, given their unique status, must have the flexibility, not afforded by the law on its face or as read by the government, to use these techniques. The Constitution requires that the law be read to permit section 501(c)(3) organizations to conduct activities permitted under the right to petition, while it seeks to restrict the "sham issue ads" targeted by Congress and this Court in *McConnell*. *See* 540 U.S. at 129-32.[9]

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[8] Indeed, only thirty-five percent of Americans can name their member of Congress at all. GARY W. SELNOW, ELECTRONIC WHISTLE-STOPS: THE IMPACT OF THE INTERNET ON AMERICAN POLITICS (1998). Without the ability to name names and describe legislators' positions on issues, it is difficult, if not impossible, to generate grassroots activity.

[9] One example of a flexible approach to lobbying activity is found in the *Noerr-Pennington* doctrine. Through this doctrine, this Court has established parameters to determine whether or not a lobbying effort is a sham. The question is whether the activities are "not genuinely aimed at procuring favorable government action" at all. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988). Lobbying activities are protected if they are aimed at achieving "governmental action," but not if their goals are achieved only by "the lobbying process itself." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379 (1991). Similar protections are extended to the filing of litigation, where this Court has considered it important whether litigants "could realistically expect success on the merits." *Prof'l Real Estate Developers, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). Because the *Noerr-Pennington* test implicates the right to petition, and because *amici* are only requesting the ability to conduct legitimate lobbying efforts, this test could serve as a guide

2. Section 501(c)(3) Organizations Should Be Permitted to Use General Funds

Appellant has suggested that when carving out a constitutional exception to the electioneering communications restrictions, this Court could require that the communications be paid for with wholly individual funds. In so doing, the as-applied exception would be similar to that of *MCFL*, 479 U.S. at 264, which applied only to social welfare organizations that foreswore all corporate and labor union contributions.

While this may be a necessary step to prevent corporate political expenditures by most nonprofit corporations, it is wholly unnecessary to require the same from section 501(c)(3) organizations, which are structurally unable to serve as vehicles for corporate political activity. Because section 501(c)(3) organizations are expressly forbidden to engage in political activity, they cannot be used as conduits for corporate political speech. Furthermore, because their mission is by definition to support public and beneficial causes as defined in the Internal Revenue Code and in IRS regulations, any speech they make cannot have the effect of magnifying corporate interests. In short, a requirement that only individual funds be used may make sense as applied to a nonprofit corporation that is permitted to engage in some political activity, such as Appellant, but the same standard need not apply to *amici* and to other public charities.

A requirement of this kind would impose a significant administrative burden on section 501(c)(3) organizations. Rather than assume this burden, many public charities will choose not to air their views on matters of public concern or

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when determining the extent of an as-applied exception to the electioneering communication restrictions.

will self-censor what they say. This will likely be the case for most small community-based public charities.[10]

CONCLUSION

Amici urge this Court to consider the as-applied challenge in this case and find in favor of Appellant, and we support Appellant's right to conduct certain restricted lobbying activities during the electioneering communication periods. Yet the Court should also consider the special circumstances presented by public charities like *amici.* Even though they are barred from partisan political intervention, and present no record or opportunity for corruption or evasion, they stand alone as groups that are completely limited in their ability to petition their elected officials over the airwaves before an election.

In finding for Appellant, the Court should make it clear that the electioneering communication restrictions cannot constitutionally be applied to the bona fide grassroots lobbying of public charities. Such an outcome is consistent with precedent, and is essential to ensure that important, nonpartisan voices fully enjoy their right to petition their government.

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[10] Although these organizations seldom can afford to pay for major broadcast advertising, the organizations will be impacted in their use of public service announcements and public access television and radio channels. These organizations are also very concerned with the trend apparent in state law to adopt similar bans on "electioneering communications" and to expand the definition to include other forms of communication. *See supra* note 4.

Respectfully submitted,

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APPENDIX

ADDITIONAL INTERESTS OF AMICI

National Organizations

Alliance for Justice

Alliance for Justice is a 501(c)(3) national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to policy processes. Most of Alliance for Justice's members are charitable organizations that receive tax exemption under Section 501(c)(3) of the Internal Revenue Code. A significant number of its members also work with, or are affiliated with, other types of nonprofit organizations that promote their views not only through public education and advocacy on public policy issues but also in the electoral process. Alliance for Justice and its 501(c)(4), Alliance for Justice Action Campaign, occasionally run broadcast ads on legislative issues – particularly those relating to judicial nominations.

American Conservative Union Foundation

The American Conservative Union Foundation ("ACUF") is the educational and charitable arm of the American Conservative Union ("ACU"), the nation's oldest conservative lobbying organization. ACUF created the "Conservative University," designed to place all of the classic documents and books of the conservative movement in one, central location. The mission of the Conservative University is to train the next generation of conservative leaders nationally by providing them, in a systematic, easily available and focused manner, the intellectual tools necessary to become successful political and civic leaders. It is a

mission that must be advanced or the movement will die. There are many things taught to conservatives but the specific mission here is to provide a fundamental core curriculum and set of ideas that can provide a lifetime guide to political and social decision-making.

Center for Lobbying in the Public Interest

The Center for Lobbying in the Public Interest promotes, supports and protects nonprofit advocacy and lobbying in order to strengthen participation in our democratic society and advance charitable missions. It accomplishes this mission through strategic messaging, a national training program, targeted resources housed on its website, www.clpi.org, and co-convening of left/right coalitions to expand and defend nonprofit advocacy rights.

NARAL Pro-Choice America Foundation

NARAL Pro-Choice America Foundation's mission is to support and protect, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy.

National Council of Jewish Women, Inc.

The National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide.

National Legal and Policy Center

The National Legal and Policy Center (NLPC) promotes ethics in public life through research, education and legal

action. NLPC is a 501(c)(3) non-profit foundation which has played an active role in the public policy debate regarding issues affecting governmental and public accountability. In furtherance of its mission, NLPC has been asked to testify on numerous occasions before Congressional committees and has participated in public policy debates. NLPC strongly opposes restrictions which will have the effect of chilling First Amendment rights of non-profits to vigorously engage in public discussion on a wide array of issues which are being considered before Congress at any given time.

National Council of Nonprofit Associations

The National Council of Nonprofit Associations (NCNA) is the network of state and regional nonprofit associations serving over 22,000 members in 46 states and the District of Columbia. NCNA links local organizations to a national audience through state associations and helps small and mid-sized nonprofits manage and lead more effectively; collaborate and exchange solutions; save money through group buying opportunities; engage in critical policy issues affecting the sector; and achieve greater impact in their communities.

National Low Income Housing Coalition

The National Low Income Housing Coalition is dedicated solely to ending America's affordable housing crisis. It believes that this is achievable, that the affordable housing crisis is a problem that Americans are capable of solving. While it is concerned about the housing circumstances of all low income people, it focuses its advocacy on those with the most serious housing problems, the lowest income households.

Violence Policy Center

The Violence Policy Center (VPC) is a national educational organization that engages in research and policy development to prevent firearm-related death and injury in America. The VPC regularly communicates with grassroots organizations and individuals in an effort to educate the public, policymakers and the media, and to activate support for gun violence prevention strategies.

Arizona Organizations

Association of American Physicians & Surgeons Educational Foundation

The Association of American Physicians & Surgeons (AAPS) Educational Foundation is an Arizona corporation founded in 1996. A 501(c)(3) organization, AAPS Educational Foundation advocates on behalf of free enterprise in medicine. It educates the public on the practice of private and ethical medicine. As part of its activities, it informs the public about positions taken by public officials. The dissemination of this information can occur within thirty days of an election by a public official. While AAPS Education Foundation does not attempt to influence the outcome of elections, its advocacy can occur in proximity to an election and thus be chilled by the contested campaign finance regulations.

California Organizations

Eden Housing, Inc.

Eden Housing is a nonprofit affordable low-income housing developer, manager and resident services provider. It works within communities to advocate for affordable housing and for the establishment and retention of social

services to help its low-income resident families, seniors and people with disabilities.

California Association of Nonprofits

California Association of Nonprofits is the nation's largest nonprofit state association. It is dedicated to reducing the barriers in the external environment in which nonprofits work and to streamlining internal operations and developing tools nonprofits can use to save time and money. With over 2,000 members representing all nonprofit sub-sectors, CAN's mission is to (a) expand and strengthen the influence, accountability, and effectiveness of California nonprofits in a manner that builds their capacity to accomplish their missions, and (b) preserve and promote the idealism and value of nonprofits in California.

Connecticut Organizations

Connecticut Association of Nonprofits

The Connecticut Association of Nonprofits organization represents nearly 500 nonprofit organizations in Connecticut. It is exempt under 501(c)(3), as are its full members.

Kentucky Organizations

- Clients Council of the Legal Aid Society

Multi-County Clients Council is a 25 year old organization that has been serving the low-income community since 1981. M3c addresses the needs and issues of the low wealth client community by providing information, educational and referral services as it relates to government benefits and services its clients receive.

Florida Organizations

Florida Association of Nonprofit Organizations

Incorporated in 1990, the Florida Association of Nonprofit Organizations (FANO) was created to address the needs of the nonprofit community at a state level. The mission of FANO is to enhance the well being of all people and communities in the State of Florida by building the capacity of the nonprofit sector. FANO assists Florida's nonprofits in strengthening their leadership, management, financial, and public policy capacity to reach their missions. FANO is a member-based service organization (over 700 members), with services to include education, coaching, train-the-trainer programs, cost-saving offerings for liability and health insurance, workers compensation, a nonprofit database and interactive website for outreach, information and education, and a Preferred Partners Program, a strong relationship with the for profit community and private sector to increase opportunities for fundraising, board development, consultant referrals, and volunteerism for nonprofits. FANO conducts advocacy education and a minimal amount of grassroots communications activities.

Maryland Organizations

Maryland Association of Nonprofit Organizations

The Maryland Association of Nonprofit Organizations is a statewide organization comprised of almost 1,600 member nonprofit agencies, associations and institutions, and its purpose is to support and enhance the effectiveness of the State's more than 22,000 nonprofit groups in carrying out their missions of public and community service. It does this through training and technical assistance to boards and staff, offering cooperative buying programs, performing research

and fostering information sharing and networking, and public education and policy advocacy.

Massachusetts Organizations

Massachusetts Council of Human Service Providers

The Massachusetts Council of Human Service Providers is the state's largest membership organization for the human service sector. Its sector reaches one in ten residents through community-based, nonprofit, organizations. It regularly organizes its members and their employees (over 60,000) to work with their elected officials to request adequate funding for human services which includes adequate salaries for low paid workers and adequate rates to fund quality services. It also encourages its members to have all stakeholders in their programs to register and vote.

Michigan Organizations

Michigan League for Human Services

The Michigan League for Human Services (MLHS) is a statewide citizens non-profit organization dedicated to education, research and advocacy for the benefit of low income and other vulnerable citizens in the state of Michigan. MLHS is comprised of over 1,900 organizational and individual members and has served the human services community in Michigan since 1912. MLHS offers Michigan's citizens an opportunity to be connected to the state's vital human services network and the chance to affect the outcome of public policy decisions that ultimately impact the lives of all of the residents of Michigan.

Michigan Nonprofit Association

The Michigan Nonprofit Association (MNA) is the collective voice of Michigan's nonprofit organizations. MNA serves as a statewide network for the sector, a resource center on effective management practices, and as an advocate for the nonprofit community.

Montana Organizations

Montana Conservation Voters Education Fund

Montana Conservation Voters Education Fund is a statewide, non-profit organization dedicated to community organizing, public education and civic engagement on behalf of this state's clean air and water, wildlife, forests and open space. MCVEF provides tools and strategies to the conservation and environmental community to be more effective participants in this state's democratic process and coordinates voter education services to over 35,000 Montana conservationists, publishes environmental briefing papers, and monitors legislation and regulations dealing with voter registration, vote by mail, Montana's ballot measure process, and environmental issues. MCVEF also provides leadership development training on communications and civic engagement techniques to the conservation and environmental community.

New Jersey Organizations

Center for Non-Profit Corporations, Inc.

The Center for Non-Profit Corporations, New Jersey's state association of non-profits, is a 501(c)(3) umbrella organization serving New Jersey's non-profit community (including 600 members) through advocacy, public education, legal and management assistance, research and

membership programs. Its advocacy and public policy work includes direct and grassroots lobbying on state and federal issues of concern to the non-profit sector. Its grassroots lobbying activities primarily take the form of newsletters, e-mail communications and occasional web page alerts which are either distributed or visible to non-members as well as members.

New York Organizations

Bronx AIDS Services, Inc.

Bronx AIDS Services is the largest non-hospital based provider of services to Bronx residents living with HIV/AIDS or at risk for HIV/AIDS. Services for HIV positive people include pantry and nutrition counseling, case management, legal services, support groups and prevention services. Prevention services include a mentoring program for adolescent girls, prevention case management, prevention programs that use the Internet as an outreach tool, street outreach, HIV counseling and testing, programs focused on high risk populations, such as adult and young MSM of color, and general education classes held both on-site and at requesting organizations.

Nonprofit Coordinating Committee of New York

The Nonprofit Coordinating Committee of New York (NPCC) is an "umbrella" nonprofit serving more than 1350 New York City area member nonprofit organizations. Its mission involves helping New York City area nonprofits to function better. NPCC provides many workshops on infrastructure issues (such as preparing for an audit or dealing with employee issues), offers discounts on goods and services needed by nonprofits, has an active Government Relations Committee that works on legislation and regulations affecting the nonprofit sector, and provides a high

volume of telephone and e-mail one-on-one advice and referrals on numerous questions that nonprofits have.

North Carolina Organizations

North Carolina Center for Nonprofits

The N.C. Center for Nonprofits is a private, 501(c)(3) nonprofit organization that serves as a statewide network for nonprofit boards and staffs, an information center on effective organizational practices, and an advocate for the nonprofit sector as a whole. It offers services directly to all sizes and types of 501(c)(3) nonprofits, and it works closely with other local, state and national groups that assist nonprofits. It communicates regularly with its membership of more than 1,600 organizations on a wide variety of important issues.

Ohio Organizations

The Urban League of Greater Cleveland

The Urban League of Greater Cleveland is a non-profit organization working to create an equal quality of life for African Americans, other minorities and persons of indigenous status through programs, services, research and advocacy.

Pennsylvania Organizations

Pennsylvania Association of Nonprofit Organizations

The Pennsylvania Association of Nonprofit Organizations is a statewide membership organization serving and advancing the charitable nonprofit sector through leadership, advocacy, education and services in order to improve the quality of life in Pennsylvania.

Housing Alliance of Pennsylvania

Established in 1985, The Housing Alliance of Pennsylvania is a statewide membership organization working for a home within reach of every Pennsylvanian, especially those with low incomes. It conducts research, education and outreach to fulfill its mission.

South Carolina Organizations

New Morning

New Morning supports programs to reduce the incidence of adolescent pregnancies in South Carolina, primarily in Richland and Charleston counties. It also supports related research-based initiatives, and encourages the formation of community coalitions to help at-risk youth, in the interest of permanent and positive community change. It does this primarily through its e-advocacy network, www.tellthemsc.org.

Texas Organizations

Liberty Legal Institute

Liberty Legal Institute is a 501(c)(3) organization that was founded in 1997. The Institute fights to protect religious freedoms and First Amendment rights for individuals, groups, and churches. The Institute's assistance is provided free of charge to ensure all individuals and groups can thrive without the fear of governments restricting their freedoms. Liberty Legal Institute is interested in this case because it occasionally engages in grassroots efforts to effect positive change in the law for Texas families, including gains in religious freedom and other civil rights for a broad spectrum of diverse organizations and individuals.

Vermont Organizations

Vermont Alliance of Nonprofit Organizations

The Vermont Alliance of Nonprofit Organizations (VANPO) is a 501(c)(3) nonprofit organization based in Vermont. It represents over 380 Vermont nonprofit organizations, plus it has approximately 80 individual and corporate supporting members. It engages in occasional grassroots communications with its members regarding issues of interest to its members.

Utah Organizations

Utah Nonprofits Association

The Utah Nonprofits Association's mission is to strengthen and promote the success of Utah's nonprofit community. It provides training, services, and advocacy on behalf of the nonprofit sector in Utah. UNA exists to help nonprofit organizations succeed by providing their leaders with valuable information, resources and training opportunities to help them more effectively manage their organizations.

Wisconsin Organizations

NARAL Pro-Choice Wisconsin Foundation

NARAL Pro-Choice Wisconsin Foundation, a section 501(c)(3) organization, supports and protects, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy.

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WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICUS CURIAE* PROFESSOR FRANCES R. HILL, UNIVERSITY OF MIAMI SCHOOL OF LAW, IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST[1]

Professor Frances R. Hill is a Professor of Law and the Director of the Graduate Program in Taxation at the University of Miami. Professor Hill earned her Ph.D. in Government at Harvard University and her J.D. at the Yale Law School. She is the co-author with Douglas M. Mancino of Taxation of Exempt Organizations.

Much of Professor Hill's scholarship and public policy activities involve the use of exempt organizations as campaign finance structures. Professor Hill is a member of the Disclosure Task Force established by the Campaign Finance Institute. Professor Hill also serves as the Tax Program Director for the Campaign Legal Center, a nonpartisan, nonprofit organization which works in the areas of campaign finance, communications and government ethics.

SUMMARY OF ARGUMENT

Nonprofit corporations may not claim exemption from federal election law requirements by virtue of their exemption from federal income taxation. This Court has consistently held in its campaign finance related cases that nonprofit corporations are subject to the same requirements under federal election law as are taxable corporations. *See, e.g., Federal Election Comm'n (FEC) v.*

[1] No counsel for a party authored any part of this brief. Monetary contributions for the preparation and submission of this brief came only from funds of *amicus* in her capacity as a Professor of Law at the University of Miami School of Law. Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

Beaumont, 539 U.S. 146, 160 (2003) ("*Beaumont*"). Nonprofit corporations enjoy the benefits of exemption from federal income taxation and, in the case of section 501(c)(3) organizations, contributors enjoy the benefit of the charitable contribution deduction.

The Court has long held that the favored tax status accorded exempt entities may be subject to conditions, and that different conditions may apply to different types of exempt entities. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), this Court held that the limitations imposed on lobbying by a section 501(c)(3) public charity did not violate the First Amendment. This Court has also long held that the benefits conferred on tax exempt entities may not be used to avoid the requirements and limitations of federal election law, and has rejected claims that these requirements violate the First Amendment when applied to nonprofit corporations. *See, Beaumont*, 539 U.S. at 163. Appellant Wisconsin Right to Life ("WRTL") and the section 501(c)(3) *amici* are advancing precisely the type of special claims based on their tax status that the Court has previously rejected.

WRTL rejects this Court's long-established position that a section 501(c)(4) organization can finance its electioneering communications through a PAC. WRTL adduces no principled reason for this position and instead simply states that it had more money available in its general treasury than in its federal PAC. This Court was not persuaded by an identical argument in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) ("*Austin*"), where the exempt Chamber of Commerce claimed the right to use treasury funds because its PAC had reached the limit on its maximum permissible expenditure. WRTL claims that its First Amendment lobbying

rights are burdened by the relatively greater difficulty of raising money for its PAC because contributors to the PAC are disclosed. This requirement relating to PAC contributors may, or may not in fact, be an inconvenience, but an inconvenience does not establish a Constitutionally impermissible burden.

WRTL and the section 501(c)(3) *amici* claim that tax exempt corporations pose no danger of circumvention or corruption because they have been formed to engage in laudable exempt activities. This argument amounts to the claim that the good intentions required of exempt entities and the good deeds of many exempt entities should create an irrebuttable presumption that all activities of all exempt entities are fully consistent with both election law and democracy. Unfortunately, this is far from the case and any such presumption is unsupportable, as the Court noted repeatedly in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) ("*McConnell*").

ARGUMENT

I. TAX EXEMPT CORPORATIONS ARE SUBJECT TO FEDERAL ELECTION LAW

WRTL bases its claims to exemption from the electioneering communications provisions of 2 U.S.C. § 441b on its status as a corporation exempt from federal income tax under 26 U.S.C. § 501(c)(4). Appellant's Brief at 21-22. Similarly, tax exempt *amici* supporting WRTL's claim base their arguments on their exemption from federal income tax under 26 U.S.C. § 501(c)(3). Brief of A Coalition of Public Charities as *Amici Curiae* in Support of Appellant at 7-8, 20-21. These arguments misconstrue the relationship

between tax exemption and federal election law. In effect, WRTL and the section 501(c)(3) *amici* claim that their tax exempt status should also exempt them from the electioneering communications provisions of section 441b. WRTL and the section 501(c)(3) *amici* do not challenge the limitations on either their election activity or their lobbying activity under federal election law, but claim only that no such limitation may be applied to electioneering communications under federal election law. As Congress has long recognized and as this Court has long held, tax exempt corporations are subject to federal election law. *See, e.g., Beaumont,* 539 U.S. at 160. A proper understanding of the process through which corporations become and remain tax exempt is inconsistent with the claims advanced by WRTL and the section 501(c)(3) *amici.* Federal tax requirements as administered by the Internal Revenue Service ("IRS") cannot be plausibly advanced as a substitute for enforcement of the requirements of federal election law in safeguarding the integrity of elections and of our democratic system.

A. Exemption From Taxation Is a Public Subsidy, In Exchange For Which Organizations Subject Their Activities To Certain Limitations

Congress has provided that exempt corporations may operate through numerous distinct forms, each of which is subject to different requirements. Once a corporation has chosen to operate under one of these forms, it is bound by the requirements applicable to that form. A section 501(c)(3) corporation may receive tax deductible contributions under 26 U.S.C. § 170, while a section 501(c)(4) organization may not. Legislative lobbying is limited for a

section 501(c)(3) organization, but is not limited for a section 501(c)(4) organization. A section 501(c)(4) organization may engage in some limited amount of participation or intervention in a political campaign, whether directly or through a separate segregated fund (a PAC), while a section 501(c)(3) organization may not.

This Court has held that exemption from taxation and the ability to accept tax deductible contributions are both subsidies indistinguishable from direct government outlays. *Regan v. Taxation with Representation,* 461 U.S. 540 (1983). Taxation with Representation ("TWR") was formed through a merger of a section 501(c)(3) organization and a section 501(c)(4) organization. It claimed the First Amendment right to use tax deductible contributions for lobbying that exceeded the amount of lobbying consistent with section 501(c)(3) status. This Court rejected that claim on the grounds that exemption is a subsidy and the government is not required to subsidize the exercise of an otherwise protected right. The Court noted that the section 501(c)(3) organization could lobby through an affiliated section 501(c)(4) organization. In sum, this Court recognized that corporations seeking to engage in multiple activities could engage in tax planning consistent with their exempt status by forming a complex structure of related exempt corporations subject to the different requirements enacted by Congress.

WRTL has followed the lead of this Court in creating its own complex structure of related exempt entities to achieve its multiple objectives, including both lobbying and participation or intervention in political campaigns. According to its Web site, (http://www.wrtl.org), the WRTL section 501(c)(4) organization is related to a section 501(c)(3) organization, The Wisconsin Right to Life Education Fund

("WRTL Education Fund"), which itself includes what the Web site describes as a "restricted fund," denominated The Veritas Society ("Veritas"), which funds a large-scale program of broadcast ads that do not reference candidates for public office or elected officials. As a section 501(c)(3) organization, WRTL Education Fund may not, as a condition of its tax exempt status, "participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3). WRTL also controls and operates Wisconsin Right to Life State PAC/Fed PAC ("State PAC/Federal PAC"), which are exempt from taxation under 26 U.S.C. § 527 as a "political organization." 26 U.S.C. § 527(e)(2). None of these organizations maintains an independent Web site but, instead, share the Web site at http://www.wrtl.org.

WRTL and its related entities evidence a sophisticated understanding of tax planning for maximum flexibility while enjoying the benefits of operating in corporate form, as well as the benefits of exemption from federal income taxation. WRTL also evidences a keen interest in securing for its contributors the benefit of the section 170 charitable contribution – which is available to those contributing to the section 501(c)(3) WRTL Education Fund and its restricted fund, Veritas. WRTL advises potential contributors on its Web site under the link headed "Tax deductibility" that "Your donation has tax implications." *See* http://www.wrtl.org/taxdeductability.htm. At the end of the Web page headed "Tax deductibility," WRTL advises potential contributors: "For professional counseling *contact our staff.*" *See* http://www.wrtl.org/taxdeductability.htm (emphasis in original). WRTL is one component of a complex structure with a sophisticated understanding of the tax

implications of the multiple entities to which it is related, all of which are accessed through its Web site at http://www.wrtl.org.

Despite its organization as a complex structure and its operation of two PACs, (one state and one federal), and the operation of a related section 501(c)(3) organization with its own separate fund, WRTL claims that using its existing federal PAC to fund electioneering communications would impose an undue burden on its right to engage in grass-roots lobbying. Brief for Appellant at 39-42. WRTL insists that its right to speak is impermissibly burdened unless it can use its general treasury funds to finance broadcast messages that it admits fall within the definition of an electioneering communication.

B. The Court Has Rejected Previous Claims that Tax Exempt Corporations Should Be Exempt from Federal Election Law

The electioneering communication provisions apply to communications paid for by any corporation, whether a taxable corporation or a tax exempt corporation. WRTL is a corporation that is funded in part by contributions from corporations. In holding that the electioneering communication provisions do not impermissibly burden the First Amendment rights of corporations, the Court in *McConnell* reaffirmed its well-established position that nonprofit corporations are corporations and that, by implication, their tax status is irrelevant to the corporation's First Amendment rights. *McConnell*, 540 U.S. at 209-10. The Court found in *McConnell*: "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in

federal elections has been firmly established in our law." *Id.* at 203. In *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982), this Court held that "[t]he statutory purpose of § 441b . . . is to prohibit contributions or expenditures by corporations or labor organizations in connection with federal elections." 459 U.S. at 201-02. Finally, this Court stated in *Beaumont*:

> In sum, our cases on campaign finance regulation represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. . . . In fact, we specifically rejected the argument made here, that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations.

Beaumont, supra, 539 U.S. at 155-57 (internal quotation marks omitted).

This Court has expressly rejected claims that nonprofit corporations do not present concerns about corruption or the appearance of corruption. This Court held in *Beaumont*:

> But concern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations. They, like their for-profit counterparts, benefit from significant "state-created advantages," *Austin, supra,* at 659 (citations omitted) and may well be able to amass substantial "political 'war chests,'" *National Right to Work*, 459 U.S., at 207 (citations omitted). Not all corporations that qualify for favorable tax treatment under § 501(c)(4) of the Internal Revenue Code lack substantial resources, and the category covers some of the Nation's most

> politically powerful organizations, including AARP, the National Rifle Association, and the Sierra Club. (footnote omitted).

Beaumont, 539 U.S. at 159-60.

C. Federal Tax Law Restrictions Are Not A Credible Substitute for Federal Election Law Restrictions

The electioneering communication provisions of federal election law were enacted by Congress and upheld by this Court for the compelling governmental interests of preventing real and apparent corruption and circumvention of existing campaign finance restrictions. *McConnell*, 540 U.S. at 189-211. This Court in *Beaumont*, 539 U.S. at 155, citing *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 457 (2001), noted that "experience demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." This Court reached the same conclusion in *Austin*, *supra*, noting that a nonprofit corporation is capable of "serving as a conduit for corporate political spending." *Austin*, 494 U.S. at 664. Probing the limits of current law to enhance inducements to circumvention is precisely what WRTL and the section 501(c)(3) *amici* are asking this Court to sanction.

Tax exempt corporations present enticing opportunities for the kind of circumvention that both Congress and the Court identified as a threat to the integrity of federal election law as well as to the integrity of democratic public policy processes. Exempt corporations may

accept contributions from any person, foreign or domestic, including taxable corporations, labor unions, political parties, candidate campaign committees, or PACs, including PACs controlled by taxable corporations or by labor unions. Exempt corporations also may accept contributions in unlimited amounts from any contributor. If contributions are made to a section 501(c)(3) organization, the contributor may claim a charitable contribution deduction under 26 U.S.C. § 170. Exempt corporations are not required to disclose their contributors or their expenditures to the public. The only form of disclosure to the government is their annual information return submitted to the IRS, which in most cases is filed long after the election is over. Unlike federal campaign finance law, federal tax law does not restrict the sources and amounts of contributions to tax exempt corporations; nor does tax law require timely, detailed public disclosure of contributions to or expenditures by tax exempt organizations.

Federal tax law provisions are consistent with attracting broad funding for exempt activities, but they are inconsistent with preventing real and apparent corruption of the electoral process. Tax law is no substitute for election law, yet WRTL and the section 501(c)(3) *amici* here are seeking to use their tax exempt status to claim that their electioneering communications should be treated as lobbying subject only to federal tax law.

Applying the label of "grassroots lobbying" and thus shifting the treatment of electioneering communications from federal election law to federal tax law would mean that none of the limitations or enforcement mechanisms put in place under federal election law would apply to the electioneering communications financed by the general

treasury funds of tax exempt organizations. These organizations are enticing conduits for political operatives. An exemption from the electioneering communications provisions for tax exempt corporations would offer private interests around the world an unregulated mechanism for influencing federal elections.

Exempt corporations that opened their general treasuries to such contributions and used the contributions to finance electioneering communications in the name of "grassroots lobbying" would face little if any risk to their exempt status. The IRS is either reluctant to or lacks the resources to enforce existing tax laws against every tax-exempt organization, much less serving to protect the interests that led Congress to enact and this Court to uphold the electioneering communications provisions. Section 501(c)(3) contains an absolute prohibition on participation or intervention in a political campaign. Section 501(c)(4) entities can engage in some political activity, but such activity cannot become their principal purpose. In both cases, however, there is considerable uncertainty and controversy concerning the nature and scope of what constitutes political intervention. The IRS has issued no precedential guidance in this area for over twenty years, and tax lawyers rely to a remarkable extent on training manuals prepared by the IRS for use in training its auditors. In the five years since enactment of the electioneering communications provisions, the IRS has never addressed the question of whether financing electioneering communications falls within the scope of the section 501(c)(3) prohibition on political intervention or the section 501(c)(4) limitation on such activity.

Even in cases where tax law would treat the activity as prohibited participation or intervention in a political

campaign, the IRS has proved itself reluctant to revoke an organization's exempt status, and tax law does not require that it do so. While section 501(c)(3) would appear to require revocation of exempt status in such cases, 26 U.S.C. § 4955 has come to operate as an intermediate sanction that permits an organization to retain its exempt status if it pays an excise tax. This tax can be abated upon a promise to institute safeguards protecting against future use of treasury funds for participation or intervention in a political campaign, even if the organization recovers none of the funds already used for political purposes. 26 U.S.C. §§ 4955(f)(3) and 4962.

Even if the IRS were willing to revoke an organization's exempt status, it would be unlikely to do so before an election. There is no provision in tax law for the kind of public complaints that can be filed with the FEC under federal election law. *See* 2 U.S.C. § 437g (detailing the FEC complaint process). No private person has standing to challenge the exempt status of a tax exempt organization. Private persons can and do write to the IRS identifying activities of exempt organizations that appear to be inconsistent with their exempt status, but the IRS has no obligation to take account of such communications in any way.

In most cases, the IRS must wait until an exempt corporation files its annual information return long after the election is over. Congress has recognized that this timing issue gives exempt entities a virtual blank check during election campaigns. To address this problem, Congress enacted two provisions intended to permit the IRS, in defined situations and through defined procedures, to take action before an organization files its annual

information return. Section 6852(a)(1) provides for termination assessments in the case of "flagrant violations of the prohibition against making political expenditures." 26 U.S.C. § 6852(a)(1). Section 7409 provides that the IRS may seek "to enjoin any section 501(c)(3) organization from making further political expenditures and for such relief as may be appropriate to ensure that the assets of such organizations are preserved for charitable or other purposes specified in section 501(c)(3)." 26 U.S.C. § 7409. The IRS has never used its authority under section 7409. While any actions taken under section 6852(a)(1) would not be a matter of public record, it does not appear that the IRS has used its authority consistently under this provision even in cases involving express advocacy of the election or defeat of a clearly identified candidate for public office.

Even if the IRS were to revoke an organization's exempt status, the organization retains its rights to seek a declaratory judgment that the revocation was in error. 26 U.S.C. § 7428. Such proceedings remain in the courts for a considerable period, which extends the period during which an organization may, presumably, claim that its exempt status supports characterization of its electioneering communications as lobbying.

In short, federal tax law is no substitute for federal election law. Efforts to shift the regulation of federal election advertising to the IRS undermine the public's legitimate interest in the orderly administration of election law.

II. ELECTIONEERING COMMUNICATION PROVISIONS DO NOT BURDEN THE FIRST AMENDMENT RIGHTS OF TAX-EXEMPT CORPORATIONS

A. The Electioneering Communication Provisions Are Narrowly Drawn to Address a Compelling State Interest

The Court in *McConnell* held that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *McConnell, supra*, 540 U.S. at 206. The Court's reasoning encompassed ads having "an electioneering purpose." *Id.* Noting the disputes among the parties and the judges on the District Court over "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose," the Court found the dispute constitutionally irrelevant by noting that "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.*

B. WRTL's Broadcast Communications Are Electioneering, Not Lobbying

WRTL invokes tax law to claim that its electioneering communications are lobbying and then, by implication, argues that the characterization for purposes of federal tax law should control for purposes of federal election law. Brief for Appellant at 21-22. This claim fails on both grounds. The electioneering communications at issue here

are not lobbying for federal tax law purposes, and there is no reason to limit the reach of federal election law to the definitions applicable under federal tax law.

WRTL claims that characterization of its electioneering communications should be based exclusively on the text of the electioneering communication and rejects claims that such characterization depends on contextual facts and circumstances. Brief for Appellant at 33. This claim allows WRTL to exclude from consideration its targeting of its electioneering communications to the voters of Wisconsin and its choice to run the electioneering communications in close temporal proximity to the primary election in which it had endorsed all the Republican Party candidates seeking to defeat the incumbent Democrat explicitly referenced in the electioneering communications. WRTL claims that its long history of electoral opposition to the incumbent Democrat should be irrelevant as well. Nothing in the applicable tax law principles supports these claims.

Characterization of activities for federal tax law purposes requires that lobbying be distinguished from both education of the public and participation or intervention in a political campaign. These three types of activities overlap, and the IRS has provided little guidance on how to determine what the appropriate characterization is when a particular communication could fit into more than one category for federal income tax purposes. In these cases, the IRS will consider all of the facts and circumstances. The IRS has not yet provided any guidance at all relating to broadcast communications that are electioneering communications for purposes of federal election law. But, the available guidance in other areas strongly suggests that contextual factors will be centrally considered. As the section 501(c)(3) *amici* themselves admit, "[t]he

context of the activity weighs alongside the activity itself; communications that would alone be considered lobbying can become impermissible political intervention if conducted in a context of partisanship." Brief of A Coalition of Section 501(c)(3) Organizations as *Amicus Curiae* in Support of Appellant at 16. Congress and this Court have both found that temporal proximity to an election creates a context of partisanship that cannot be ignored in characterizing these broadcast communications, consistent with the applicable provisions of federal election law.

WRTL and the section 501(c)(3) *amici* claim that lobbying is a readily defined category with clear boundaries. Brief for Appellant at 20-24; Brief of A Coalition of Public Charities as *Amicus Curiae* in Support of Appellant at 11-12. This is far from the case. Experience with section 527 organizations that claim they are not required to register with the FEC as political committees supports the idea that activities which would be treated as lobbying for purposes of section 501(c)(4), will be treated by the IRS as electioneering for purposes of section 527. Because section 527 organizations must operate for the purpose of influencing the outcome of elections, the IRS has found that grassroots lobbying conducted by such organizations "will have a political purpose even though they do not expressly advocate the election or defeat of any particular candidate." I.R.S. Private Letter Ruling 9725036 (March 24, 1997). This exercise in recharacterization of, in at least some cases, the very same communication with an identical text, strongly supports the idea that the characterization of a lobbying activity is fluid and uncertain, contrary to the claims advanced by WRTL.

Even if the electioneering communications at issue here could be characterized as lobbying using the definitions of federal tax law, WRTL would be unable to sustain its claim that lobbying communications are properly accorded a higher level of constitutional protection under the First Amendment than are other forms of political speech. This Court has specifically rejected imposing a hierarchy of constitutional protections of the kind WRTL advances. The Court in *McConnell* cited with approval the conclusion in *Buckley* that "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *McConnell*, 540 U.S. at 205, citing *Buckley*, 424 U.S. at 48.

C. WRTL May Fund Electioneering Communications Through Multiple Strategies Readily Available to It

Appellant claims that the electioneering communications provisions burden its First Amendment rights to speak and to petition the government because it cannot use its general treasury funds to pay for broadcast communications during the statutorily defined periods before primary and general elections. Appellant does not deny that it could fund such broadcast communications through its existing PAC, but it claims that doing so constitutes an impermissible burden on its First Amendment rights. Appellant notes that it has more money in its general treasury than it has in its PAC. It claims that raising money for the PAC is more difficult than raising money for the section 501(c)(4) organization's general treasury, in part because contributions to a PAC are subject to contribution

limits and contributors to the PAC are subject to disclosure.

Alternatively, WRTL suggests that it would be willing to establish a separate fund within its general treasury fund to which only qualified individuals could contribute and for which contributions would not be subject to any limit. Brief for Appellant at 30 and 32. This fund would permit WRTL to operate as a hybrid organization that enjoys the benefits of having a quasi-*MCFL*-type element embedded within it while at the same time permitting it to continue to accept corporate contributions or to engage in unrelated trade or business activities. *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). This hybrid structure would constitute a "*MCFL*-lite" structure that did not require a section 501(c)(4) organization to make the choice between corporate funding and independent expenditures that the Court mandated in *MCFL*. This is the same choice that the Court required with respect to electioneering communications in *McConnell*. Far from characterizing this choice as an impermissible burden on a constitutional right, the Court in *McConnell* found the ability to make the choice to operate through a PAC or an *MCFL*-type entity alleviated any danger of an impermissible burden. *McConnell*, 540 U.S. at 209-11.

D. Section 501(c)(3) *Amici* Are Not Uniquely Burdened by the Electioneering Communication Provisions

The section 501(c)(3) *amici* claim that their First Amendment rights are uniquely burdened because a section 501(c)(3) organization, unlike a section 501(c)(4) organization, cannot establish a PAC. Brief of the Alliance

for Justice as *Amicus Curiae* in Support of Appellant at 27. The Court in *Taxation with Representation, supra*, rejected the claim that lobbying limits placed on section 501(c)(3) organizations violated their First Amendment speech rights. The Court reasoned:

> Both tax exemption and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax that it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to those charitable organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

Taxation with Representation, 461 U.S. at 544.

In his concurrence, Justice Blackmun agreed that the First Amendment does not require that lobbying be subsidized. *Id.* at 551. He found that the ability of section 501(c)(3) organizations to engage in unlimited lobbying with nondeductible contributions through a controlled section 501(c)(4) organization cured any First Amendment concerns.

The section 501(c)(3) *amici* could establish a controlled section 501(c)(4) organization that, in turn, could finance electioneering communications through its own controlled PAC. Alternatively, the section 501(c)(3) *amici*

could establish a separate section ~~501(c)~~(4) organization that itself satisfied the requirements this Court established in *MCFL*, including the requirement that it be funded solely by qualified individuals, as *amicus* Alliance for Justice observes. Brief for the Alliance for Justice as *Amicus Curiae* in Support of Appellant at 22-23. As this Court held in *McConnell*, an *MCFL*-type organization can use its treasury funds to finance electioneering communications.

The section 501(c)(3) *amici* reject both of these alternatives. The reason adduced is that doing so would impose an undue administrative burden on the section 501(c)(3) organization. This claim is surprising in light of the common use of complex structures of multiple types of exempt and taxable entities. Tax law provides clear guidance for these commonly used structures. The section 501(c)(3) *amici* also claim that either of these alternatives would burden their speech rights because contributions to a section 501(c)(4) organization are not deductible by the contributors. This reasoning is inconsistent with the Court's subsidy analysis in *Taxation with Representation*.

The section 501(c)(3) *amici* argue that their claim to use their treasury funds to finance electioneering communications is supported by their nature as public charities. Brief of A Coalition of Public Charities as *Amicus Curiae* in Support of Appellant at 24 (describing section 501(c)(3) organizations as "structurally unable to serve as vehicles for corporate political activity"). *Amicus* Alliance for Justice claims that section 501(c)(3) organizations "do not engage in the types of activities that might justify governmental intrusions on speech." Brief of the Alliance for Justice as *Amicus Curiae* in Support of Appellant at 4. Certain section 501(c)(3) *amici* claim that lobbying is part of the

charitable mission of section 501(c)(3) organization. Brief of A Coalition of Public Charities as *Amicus Curiae* in Support of Appellant at 19-20. This is not the case under federal tax law. Lobbying is a permissible activity for a section 501(c)(3) group, subject to limits, but it is not an exempt activity that itself would support exempt status as a section 501(c)(3) organization. Indeed, tax law contains no requirement that lobbying be substantially related to an organization's exempt purpose. Like unrelated trade or business activity, lobbying is permissible only if limited. In no circumstances does lobbying itself support section 501(c)(3) exempt status.

III. FUNDING ELECTIONEERING COMMUNICATIONS WITH TREASURY FUNDS BURDENS THE SPONSORING ORGANIZATION'S MEMBERS' ASSOCIATIONAL RIGHTS

The associational rights of an organization derive from its members, as this Court found in *Beaumont,* 539 U.S. at 161, n. 8 ("corporation's First Amendment speech and association interests are derived largely from those of their members"). *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1956). The Court has long held that the regulation of corporate political activity protected "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *FEC v. National Right to Work Comm.*, 459 U.S. at 208, cited in *Beaumont*, 539 U.S. at 154. A well-established line of cases has established the associational rights of members in organizations and has not permitted organizations to give

unfettered reign to the choices made by organizational managers.

Members' associational rights are particularly burdened when organizational managers propose to use general treasury funds for electioneering. This Court held in *Beaumont* that "[t]he PAC option allows corporate political participation with the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure, see §§ 432-34, without jeopardizing the associational rights of advocacy organizations' members. . . ." *Beaumont*, 539 U.S. at 163. Similarly, this Court in *Austin* held that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Austin*, 494 U.S. at 658.

These risks are consistent with the reasons that the limitations or prohibitions on participation or intervention in political campaigns are a condition for exemption from federal income taxation. A candidate for public office necessarily takes positions on a broad range of issues. Any individual's voting decision represents a balance among issues and judgments about a candidate's character and constituency service. In sum, a voting decision is based on multiple factors. As such, voting choices defy easy explanation, despite the efforts made by political operatives and academics to develop models that can reliably predict voting behavior and election outcomes. There is no reason to think that all the members of WRTL who paid dues into the general treasury to support the organization's efforts to educate the public on its issues also want their contributions

used to elect or defeat particular candidates. Concerns about milk prices in America's Dairyland or about support for education or about foreign policy may have been, to some members of WRTL, more compelling components of their voting decision than a candidate's position on the issue espoused by WRTL.

The PAC option, which WRTL rejects solely on the grounds of lack of funding in its own PAC, protects the associational rights of members who paid dues to an advocacy organization but did not contemplate that their dues would be used for electioneering communications. As this Court found in *Austin, supra*, regarding the option to fund election activities through a PAC, "[b]ecause persons contribute to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views." *Austin*, 434 U.S. at 660-61. The portrait of a membership organization as an association of persons whose views on an issue compel a lockstep, unreflective voting decision is inconsistent with the First Amendment associational rights that this Court has been at pains to protect.

WRTL relies on *MCFL* in claiming unfettered managerial discretion in the name of the First Amendment right of association. This reading of *MCFL* cannot be reconciled with the facts or this Court's reasoning in that case. This Court in *MCFL* tightly defined the requirements for the exception from section 441b of the campaign finance laws. *MCFL*, 479 U.S. at 258. This Court in *Austin* held that each of these three requirements for *MCFL* status was "'essential' to our holding" and refused to extend to the Michigan State Chamber of Commerce the same treatment

on grounds that it did not satisfy the precise requirements this Court articulated in *MCFL*. *Austin*, 494 U.S. at 662.

While WRTL admits that it does not fit within the facts that the Court found essential in *MCFL*, it claims that it is almost like *MCFL* and that, as a constitutional matter, almost like *MCFL* should be close enough. Brief for Appellant at 31. In particular, WRTL dismisses the importance of having a policy stating that the organization will not accept contributions from corporations. Brief for Appellant at 31-32. Yet, this Court found the existence of such a policy a critical factor in its reasoning in *MCFL* and in distinguishing *MCFL* from the Chamber of Commerce in *Austin*. A policy of refusing corporation contributions is crucial in protecting the associational rights of individual members. The prohibition on the use of corporate treasury funds to finance PACs serves the same purpose. The policy prohibiting corporate contributions to PACs and to *MCFL*-type section 501(c)(4) organizations is the core mechanism ensuring that the marketplace of political ideas reflects support by voters and potential voters. Claims that organizations that are almost PACs or almost *MCFL* organizations ignore and disregard the rights of their members, which are the core of the associational rights protected under the First Amendment. WRTL complains that soliciting funds for its PAC only from persons who are members of WRTL is a "time-consuming, cumbersome process." Brief for Appellant at 41. This, however, is the very process that should characterize the operation of a nonprofit, tax-exempt membership organization.

The fact that the PAC controlled by WRTL did not possess sufficient funds to pay for the electioneering communications strongly suggests that the dues-paying members of WRTL did not choose to fund candidate

endorsements at the same level at which they chose to support the activities of WRTL itself. The relatively greater amount of money in the general treasury of WRTL indicates membership preferences. WRTL complains about the greater difficulty of raising money for the PAC compared with raising money for the general treasury of WRTL. This reality reflects a choice made by members. Such a choice is not an impermissible burden on a constitutional right but the very essence of the members' constitutional rights in action. Far from supporting WRTL's claim to use its treasury funds for electioneering communications, the facts set forth by WRTL indicate that §441b is protecting members' First Amendment rights of association.

IV. PERMITTING EXEMPT CORPORATIONS TO AVOID COMPLIANCE WITH FEDERAL ELECTION LAW ERODES THE INTEGRITY OF TAX LAW AND UNDERMINES PUBLIC CONFIDENCE THAT EXEMPT ORGANIZATIONS ARE OPERATING IN THE PUBLIC INTEREST

The claims advanced here by Appellant WRTL and the section 501(c)(3) *amici* would erode public confidence that nonprofit tax-exempt organizations are operating in the public interest and not in the private interest of candidates for public office and those organization managers who wish to use general treasury funds to support them. The entire structure of the tax law applied to exempt organizations is designed to ensure that the subsidy represented by exemption is used to benefit public interests, not private interests. Benefits to political parties and candidates for public office have been treated as private benefits for purposes of federal tax law. *American Campaign Academy v. Comm'r*, 92 T.C. 1053 (1989).

The leading academic theory of why certain organizations are exempt from federal income taxation is based on the importance of the prohibitions on various types of private benefit set forth in federal tax law. Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Tax,* 91 Yale L. J. 54 (1981); *Reforming Nonprofit Corporation Law,* 129 U. Penn. L. Rev. 500 (1981). Although this tax-based structure is far from perfect, it represents the only meaningful way to address issues of transparency and accountability in exempt organizations. Members, contributors, and beneficiaries of tax exempt organizations all depend on the integrity of federal tax law to ensure that those organizations serve the public interest rather than private interests.

Appellant and the section 501(c)(3) *amici* urge this Court to enshrine in federal election law provisions that will exacerbate the consequences of corruption and appearance of corruption as a matter of federal election law and will, at the same time, exacerbate the lack of transparency and accountability of exempt organizations that has been a central concern under federal tax law. The integrity of federal tax law can be safeguarded if WRTL and the section 501(c)(3) *amici* who support WRTL avail themselves of the several options already available to them to fund their electioneering communications without using treasury funds for an activity treated as a private benefit under federal tax law.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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No. 04-1581

DEC 19 2005

IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* SENATOR JOHN MCCAIN, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Whether the three-judge district court correctly rejected Appellant's as-applied constitutional challenge to 2 U.S.C. § 441b(b)(2)—the federal law requiring corporations to finance electioneering communications with funds from a separate segregated fund—on the ground that this Court's decision in *McConnell v. FEC* is dispositive.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, Senator John McCain, Representative Christopher Shays, and Representative Martin Meehan, are three of the four principal sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[2] These Members of Congress have devoted enormous time and energy to ensuring that our federal campaign finance laws are meaningful and not subject to wholesale evasion. They worked for seven years to enact BCRA to close glaring loopholes in the then-existing system. They participated as intervening defendants in *McConnell v. FEC* to defend the constitutionality of those loophole-closing measures.

If the critical provisions contained in Title II of BCRA, at stake in this case, are not applied to advertisements like those that Wisconsin Right to Life, Inc. sought to air, then *amici*'s efforts will be gravely undermined. Corporations will once again obtain a roadmap to evading the long-standing ban on corporate expenditures to influence federal elections. *Amici* respectfully submit that the three-judge court correctly concluded that this Court's decision in *McConnell* is dispositive and reaffirms that Congress possesses the authority necessary to ensure that the federal campaign finance laws are meaningful and not routinely circumvented.

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[1] *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Senator Russell Feingold, the fourth principal sponsor of BCRA, is not participating as *amicus* in this case because the WRTL ads refer to Senator Feingold.

STATEMENT OF THE CASE

A. Factual Background

This case involves three television ads that Appellant, Wisconsin Right to Life, Inc. ("WRTL"), sought to run shortly before the 2004 federal election in Wisconsin with funds from its corporate treasury. Although WRTL is a non-profit corporation, it accepts contributions from corporations. Jurisdictional Statement Appendix ("J.S. App.") 4a. Because WRTL's receipt of corporate contributions prevents WRTL from using its corporate treasury to finance expenditures on behalf of or opposed to candidates for federal office, 2 U.S.C. § 441b(b)(2), WRTL maintains a political action committee, the Wisconsin Right to Life Political Action Committee ("WRTL-PAC"), in order to make such expenditures. J.S. App. 5a. WRTL also endorses and opposes candidates for federal office. *Id.*

In 2004, WRTL targeted U.S. Senator Russell Feingold for defeat. J.S. App. 5a. The WRTL-PAC announced in the title to a March 5, 2004 press release its "*Top Election Priorities*: Re-elect President Bush ... Send Feingold Packing."[3] Warning that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections," WRTL-PAC's Chair Bonnie Pfaff emphasized that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." FEC Ex. 4. The press release also noted that WRTL's three endorsed candidates for Feingold's Senate seat "all stated they would oppose a filibuster" if the Senate Judiciary Committee returned a favorable or neutral recommendation on a judicial nominee. *Id.*

Three weeks later WRTL itself issued a similar release subtitled, "Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush ... Send Fein-

[3] Exhibit 4 to FEC's Exhibits Submitted in Support of Its Opposition to Plaintiff's Motion for a Preliminary Injunction ("FEC Ex.").

gold Packing!"[4] This release again clearly stated WRTL's "resolve to do everything possible . . . to send Russ Feingold packing." *Amici* Ex. C. WRTL continued to advocate Senator Feingold's defeat during the summer of 2004, and, in a July 14, 2004 news release, criticized Senator Feingold for his position on the filibuster of judicial nominees. FEC Ex. 16.

On July 26, 2004, as the September primary election neared, WRTL began using its corporate treasury funds to finance the three ads at issue here. J.S. App. 6a. The lead-in to each ad differs somewhat, but each criticizes a "group of Senators" for filibustering judicial nominees and preventing "a simple 'yes' or 'no' vote" and then requests the viewer to "Contact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* at 13a-17a. The ads, however, did not provide viewers with the phone number or address of either senator. *Id.* Because the three ads were broadcast on television, referred to a clearly identified candidate for federal office, and targeted the electorate of that candidate, the ads, if run during the statutorily prescribed period, would constitute "electioneering communications." 2 U.S.C. § 434(f)(3)(A)(i); BCRA § 201. Accordingly, federal law required WRTL to begin using its PAC funds to finance these advertisements starting on August 15, 2004, thirty days before the primary election. 2 U.S.C. § 441b(b)(2); BCRA § 203. Alleging that this statute could not constitutionally be applied to its advertisements, WRTL filed suit on July 28, 2004, seeking an injunction prohibiting the Federal Election Commission from enforcing the statute with regard to WRTL's advertisements.

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[4] Exhibit C in Support of the Memorandum of *Amici* Senator John McCain, Representative Christopher Shays, Representative Martin Meehan, Democracy 21, The Campaign Legal Center, and the Center for Responsive Politics in Opposition to Plaintiff's Motion for a Preliminary Injunction ("*Amici* Ex.").

B. The Lower Court's Rulings

The three-judge district court (Sentelle, R. Roberts, Leon) denied WRTL's motion for a preliminary injunction on August 17, 2004. J.S. App. 4a-12a. In its unpublished Memorandum Opinion and Order of August 17, 2004, the district court held that WRTL was unlikely to prevail on the merits for two reasons. First, the district court concluded that this Court's decision in *McConnell* "leaves no room for the kind of 'as applied' challenge WRTL propounds before us." *Id.* at 7a. Second, said the court, "[t]he facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* at 8a. After further briefing, the district court subsequently dismissed WRTL's as-applied challenge on May 9, 2005 "for the reasons set forth in its prior opinion."[5] *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

Amici urge this Court to hold that § 441b is constitutional as applied to WRTL's three ads. WRTL's ads directly implicate Congress's well-established interest in preventing corporate treasuries from being used to influence federal elections. Furthermore, the rule that WRTL urges this Court to adopt would functionally overrule this Court's decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), and would invite the wholesale evasion of the long-standing ban on the use of corporate treasury funds to influence federal elections.

Two years ago this Court held that Congress has a compelling interest in requiring corporations, including non-profit corporations, to finance electioneering ads with funds

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[5] On September 14, 2004, Chief Justice Rehnquist denied WRTL's application for an injunction pending appeal, noting that it would be an "extraordinary remedy, particularly when this Court recently held the Act facially constitutional, and when a unanimous three-judge District Court rejected applicant's request for a preliminary injunction." 542 U.S. 1305, 1305-1306 (Rehnquist, C.J., in chambers) (citations omitted).

from a segregated PAC account. *McConnell*, 540 U.S. at 204-211. Just as Congress may legitimately prohibit corporate treasury expenditures on ads that expressly advocate a candidate's election or defeat, it may also constitutionally require electioneering communications aired shortly before election day to be financed with funds from the corporation's segregated PAC account. This is true for two reasons. First, the vast majority of corporate-funded ads that are aired shortly before an election and that refer by name to a clearly identified candidate possess a readily apparent electioneering purpose and effect. Second, even in cases where the purpose of the ad is less clear, the availability of the segregated-PAC alternative provides corporations with a constitutionally-sufficient avenue for financing genuine issue ads. *Id.* at 206.

Under *McConnell*, WRTL cannot sustain an as-applied challenge to § 441b for two reasons. First, the record establishes that WRTL aired the ads in an attempt to influence a federal election. In the months leading up to WRTL's decision to air these ads, WRTL publicly proclaimed that one of its top two priorities was to defeat Senator Feingold, and it cited the filibuster issue as the linchpin for its opposition to his re-election. *See* FEC Exs. 4, 16; *Amici* Ex. C. Reflecting WRTL's electoral strategy, the three ads criticized a group of Senators for filibustering judicial nominees and urged voters to contact Senator Feingold without providing the senator's phone number or office address. J.S. App. 13a-17a. WRTL clearly intended to influence a federal election with corporate treasury funds. Accordingly, WRTL's ads implicated Congress's compelling interest in preventing the use of corporate funds to influence federal elections. *See McConnell*, 540 U.S. at 205 ("The . . . question—whether the state interest is compelling—is easily answered by our prior decisions regarding campaign finance regulation, which 'represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'").

As these facts vividly illustrate, ads that might appear on their face to be so-called "grassroots lobbying ads" are often in fact electioneering ads. Because WRTL's as-applied challenge rests on the nature of its ads, rather than WRTL's status as a non-profit corporation, sustaining this as-applied challenge would permit all corporations, even Fortune 500 companies, to use their treasuries to finance ads that, like WRTL's ads, possess an unmistakable electioneering purpose. Therefore, granting WRTL the exemption it seeks would effectively overturn *McConnell*, eviscerate Title II of BCRA, and open the floodgates for corporate (or union) treasury spending on federal elections.

Second, even if the intent of WRTL's ads were less than clear, this Court's decision in *McConnell* would still foreclose this as-applied challenge. *McConnell* explicitly held that the segregated-fund alternative represents a constitutionally-sufficient safety valve for corporations "in doubtful cases." 540 U.S. at 206. As this Court explained, § 441b does not constitute a "complete ban" on corporate electioneering communication expenditures. *Id.* at 204. Rather, the statute represents a sensible regulation that merely requires corporations to fund such communications with voluntary contributions from their members. *Id.*

WRTL presents no reason why this Court should cast aside its established precedent other than the contention that WRTL has not been able to raise sufficient funds from individual supporters for purposes of running the ads—a fact that hardly counsels in favor of using general treasury funds to make up for that lack of support. WRTL and its *amici* also raise two issues that are irrelevant to this as-applied challenge. First, because WRTL is a 501(c)(4) corporation with an established PAC, this challenge does not concern the constitutionality of applying § 441b to a 501(c)(3) corporation that may not, consistent with the tax code, directly create a PAC. Second, the constitutionality of applying § 441b to a corporation that segregates funds it receives from other corporations from the funds it receives from individuals is also not at issue because the record contains no suggestion

that WRTL ever had such a separate account. Rather, WRTL chooses to accept corporate contributions, and deposits them with all its other revenue sources, thereby creating the risk that WRTL will serve as a conduit for the unlawful corporate funding of federal election activity. In short, § 441b constitutionally applies to WRTL and, in particular, to the ads it sought to run here.

ARGUMENT

I. CONGRESS AND THIS COURT HAVE LONG RECOGNIZED THE CORRUPTING INFLUENCE OF CORPORATE TREASURY EXPENDITURES ON FEDERAL ELECTIONS.

A. Congress's Century-Long Effort To Combat Corporate Corruption Warrants Considerable Deference.

Section 441b, the statute at issue, traces its roots to the Tillman Act of 1907, ch. 420, 34 Stat. 864. The Tillman Act represented Congress's sensible response to a national concern over the corrosive effect of corporate spending on elections, which received widespread attention during the election of 1904. *United States v. Automobile Workers*, 352 U.S. 567, 571-572 (1957). The defeated candidate for the presidency captured this popular concern when he said that "[t]he greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections?" *Id.* at 572 (quoting Hearings before House Committee on Elections, 59th Cong., 1st Sess. 12). President Theodore Roosevelt himself recommended in his 1905 message to Congress that "[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law." *Id.* (quoting 40 Cong. Rec. 96). Congress, heeding this call, enacted the Tillman Act and thereby prohibited "any corporation . . . [from] mak[ing] a money contribution in connection with any election to any political office." *Id.* (quoting 34 Stat. 864).

Congress moved in 1925 to strengthen the Tillman Act through the adoption of the Federal Corrupt Practices Act,

which, in part, extended the prohibition on corporate contributions to cover "anything of value" and made the giving or receiving of corporate contributions a federal crime. *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (citing Federal Corrupt Practices Act of 1925, §§ 301, 313, 43 Stat. 1070, 1074). The Smith-Connally Act of 1943 temporarily applied the Corrupt Practices Act to labor unions. *Automobile Workers*, 352 U.S. at 578 (citing 57 Stat. 163, 167). Despite this statute, "Congress was advised of enormous financial outlays said to have been made by some unions in connection with the national elections of 1944." *Id.* at 579. After concluding that Congress intended the prohibition on contributions from corporate and union treasuries to cover expenditures, the House Special Committee to Investigate Campaign Expenditures recommended legislation clarifying that the Corrupt Practices Act covered "expenditures by the prohibited organizations in connection with elections." *Id.* at 582 (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 46). As the Court acknowledged, "it was obvious that the statute as [previously] construed could easily be circumvented through indirect contributions." *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 115 (1948). Shortly thereafter, Congress passed the Taft-Hartley Act, which implemented the Committee's recommendation in order to, as Senator Taft explained, "plug up a loophole which obviously developed, and which, . . . as a matter of fact, would absolutely have destroyed the prohibition against political advertising by corporations." *Automobile Workers*, 352 U.S. at 583 (quoting 93 Cong. Rec. 6439).

"In early 1972 Congress continued its steady improvement of national election laws by enacting [the Federal Election Campaign Act]." *McConnell*, 540 U.S. at 117. As this Court recounted in *McConnell*, "[t]he law ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures, but expressly permitted corporations and unions to establish and administer separate segregated funds (commonly known as political action committees, or PACs) for election-related contributions and expenditures." *Id.* at 118.

Despite Congress's longstanding efforts to prevent corporate corruption of federal elections, corporations during the 1990s began using their general treasury funds to finance sham "issue" ads that in reality were designed and run with a clear electioneering purpose. This avenue for corporate circumvention arose out of this Court's decision in *Federal Election Commission v. Massachusetts Citizens for Life* ("*MCFL*") where, in order to avoid constitutional vagueness problems with the former version of § 441b, this Court interpreted the statute to apply only to expenditures that expressly advocated a candidate's election or defeat. 479 U.S. 238, 249 (1986). On that interpretation, corporations quickly learned that simply by avoiding the magic words of express advocacy, corporations could freely spend money from their corporate treasuries to influence federal elections. As this Court later acknowledged, "the unmistakable lesson from the record" in *McConnell* was that the express advocacy "requirement is functionally meaningless" because the "absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." 540 U.S. at 193.

Congress responded to this pattern of evasion by enacting BCRA § 203, which amended § 441b to require corporations to finance all "electioneering communications" with funds from a separate PAC account. To alleviate the vagueness problem that plagued the "in connection with" requirement of the 1972 Act, while plugging the loophole opened by the express advocacy test, the statute objectively defined "electioneering communications" to include any "broadcast, cable, or satellite communication" that:

> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within--
>
> > (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> >
> > (bb) 30 days before a primary or preference election, or a convention or caucus of a political

> party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A)(i); BCRA § 201. In short, BCRA's amendment of § 441b reflected Congress's judgment, dating back a century, that "the special characteristics of the corporate structure require particularly careful regulation." *National Right to Work*, 459 U.S. at 210.

B. This Court Has Repeatedly Deferred To Congress's Judgment That Corporate Electioneering Expenditures Require Careful Regulation.

This Court has never questioned Congress's decision to require corporations to finance electioneering expenditures with segregated PAC funds. To the contrary, the Court has repeatedly said that Congress's "careful legislative adjustment of the federal electoral laws, in a 'cautions advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference . . . [and] reflects a permissible assessment of the dangers posed by those entities to the electoral process." *National Right to Work*, 459 U.S. at 209 (internal citation omitted); *see also McConnell*, 540 U.S. at 117; *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 162 n.9 (2003) ("Judicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of 'careful legislative adjustment.'").

This Court first considered the constitutionality of § 441b in *National Right to Work*, 459 U.S. at 209-10. In holding that § 441b could constitutionally be interpreted to limit PAC solicitations to members with "some relatively enduring and independently significant financial or organizational attachment," *id.* at 204, this Court explained that two

important interests underlie § 441b: (1) "ensur[ing] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions," and (2) "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Id.* at 207-208. Finding that these interests supported application of § 441b to membership corporations as well as traditional stock corporations, this Court stated that "[w]hile § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress's judgment that it is the potential for such influence that demands regulation." *Id.* at 209-210.

This Court reaffirmed the important interests underlying § 441b in *MCFL*, 479 U.S. at 238. As the Court explained there, "[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *Id.* at 257. The *MCFL* decision correctly recognized that § 441b represents an attempt to alleviate this threat to the political marketplace "[b]y requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending." *Id.* at 258.

This Court concluded, however, that these compelling interests did not justify application of § 441b to MCFL, a non-profit corporation that did not accept corporate contributions. As the Court emphasized, "it is [MCFL's] policy not to accept contributions from [business corporations or labor unions]." 479 U.S. at 264. This fact was critical to the Court's holding because a no-corporate-contributions policy "prevents such [non-profit] corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.*

This Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990), confirmed that a nonprofit corporation could avoid § 441b's modest requirements only by eschewing corporate contributions. *Austin* rejected an as-applied challenge to a Michigan statute forbidding corporate political expenditures, brought by a nonprofit corporation that, unlike MCFL but like WRTL here, accepted contributions from for-profit corporations. In distinguishing the facts of *Austin* from those in *MCFL*, this Court explained that an exemption for a nonprofit corporation that received contributions from for-profit corporations would permit "[b]usiness corporations [to] circumvent the Act's restriction by funneling money through the [nonprofit corporation's] general treasury." *Id.* at 664. Thus, "[b]ecause the [nonprofit corporation] accepted money from for-profit corporations, it could, absent application of [the Michigan statute], serve as a conduit for corporate political spending." *Id.*

Following the precedent laid down in *National Right to Work* and *MCFL*, the *Austin* Court also upheld the constitutionality of the Michigan statute's requirement that corporations finance independent expenditures with funds from a segregated account. 494 U.S. at 658. Recognizing the established principle that "'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form,'" *id.* at 659 (quoting *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 500-501 (1985)), this Court concluded that the Michigan statute appropriately aimed at the "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. Thus, *Austin* eliminated any doubt that the compelling government interest in preventing corporate corruption of the electoral process extended to expenditures as well as direct candidate contributions, for "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures,

just as it can when it assumes the guise of political contributions." *Id.*

This Court also recognized in *Austin* that the Michigan analogue to § 441b represented a narrowly-tailored strategy for addressing corporate corruption of candidate elections because it permitted corporations to participate in the electoral arena through the establishment of segregated PAC funds. *Id.* As this Court explained:

> We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views. . . . [T]he Act does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds. Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views.

Id. at 660-661 (emphasis in original). And just as this Court had done in *National Right to Work*, the *Austin* decision refused to find the Michigan statute overbroad on account of its application to all corporations, including those without substantial wealth. After all, the "potential for distortion justifie[d] [the Michigan statute's] general applicability to all corporations." *Id.* at 661.

This Court has continued to adhere to the principle that Congress's regulation of corporate involvement in the electoral process warrants considerable deference. *See Beaumont*, 539 U.S. at 156-163. In *Beaumont*, a non-profit advocacy corporation unsuccessfully brought an as-applied challenge to § 441b. In rejecting the notion that nonprofit corporations do not pose a threat to the political marketplace, this Court reaffirmed that the potential for abuse justified Congress's decision to apply § 441b to nonprofit corporations. This Court reasoned that nonprofit corporations, "like their for-profit counterparts, benefit from significant 'state-

created advantages,' and may well be able to amass substantial political 'war chests.'" *Id.* at 160 (citations omitted). Because "[n]ot all corporations that qualify for favorable tax treatment under § 501(c)(4) of the Internal Revenue Code lack substantial resources, and the category covers some of the Nation's most politically powerful organizations, including the AARP, the National Rifle Association, and the Sierra Club," this Court recognized that Congress could constitutionally require nonprofit 501(c)(4) corporations to finance direct candidate contributions through segregated PAC funds. *Id.* This was particularly true because, as the Court had said before, § 441b does not represent a "ban" on corporate political activity, but rather "allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Id.* at 163.

In short, even before this Court considered the constitutionality of BCRA's amendments to § 441b, the Court had repeatedly recognized Congress's legitimate interest in regulating corporate treasury expenditures. Moreover, the constitutionality of applying § 441b to non-profit corporations like WRTL that accept corporate contributions was well established. Finally, this Court's decisions had found that the segregated-PAC option represented a constitutionally sufficient method for corporations (with the sole exception of direct expenditures by nonprofit advocacy groups that accept no corporate funding) and unions to participate in the electoral process.

C. *McConnell* Reaffirmed Congress's Important Interest In Regulating Corporate Expenditures Designed To Influence Federal Elections.

Because BCRA's amendment of § 441b effectively furthered Congress's compelling interest in preventing corporate treasuries from influencing federal elections (and avoided constitutional vagueness issues), this Court upheld that provision against a facial challenge in *McConnell*. 540 U.S. at 204-207. The *McConnell* decision recognized that the issue whether Congress had a compelling interest in regulat-

ing corporate expenditures on electioneering communications was "easily answered by our prior decisions . . . , which represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (internal citations and quotations omitted).

In an attempt to distinguish these prior cases, the *McConnell* "plaintiffs argue[d] that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." 540 U.S. at 205-206. Just as Wisconsin Right to Life argues here, the National Right to Life Committee asserted there that BCRA's "'electioneering communication' restrictions would eliminate . . . [a] whole category of speech, [which] is *grass roots lobbying*, in which Citizens Associated for Amplified Free Expression, Inc. . . . buys broadcast ads in the district of the legislator with an important vote needed to pass legislation protecting the nation from ruin by encouraging citizens to 'Call Representative Swing-Vote and ask for her to vote for the bill sponsored by Representatives Commonweal and Controversy.'"[6] The National Rifle Association ("NRA") and other BCRA challengers likewise argued that § 441b would improperly prohibit corporations from financing ads that urged voters to contact Members of Congress to support or oppose legislation.[7]

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[6] Reply Brief for Plaintiffs-Appellants/Cross-Appellees The National Right to Life Committee 6, *National Right to Life Comm. v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1733).

[7] Brief for Appellants The National Rifle Association 36-37, *National Rifle Ass'n v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1675); *see also* Brief of AFL-CIO Appellants/Cross-Appellees 19, *AFL-CIO v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1755) (arguing that "§ 203 precludes . . . communications that . . . [c]all upon a Member of Congress to support or oppose imminent legislation, or ask viewers or listeners to urge the Member to do so"); Opening Brief of the "Business Plaintiffs" 18, *Chamber of Commerce v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1756) (asserting that "many issue ads conclude by asking

In support of his unsuccessful contention that BCRA unconstitutionally banned grassroots lobbying, Senator McConnell attached two ads to his brief that cannot be meaningfully distinguished from the ads WRTL sought to run. Both of the featured ads commented on actual legislative issues, and neither commented on the candidate's fitness for office, expressly criticized the candidate, or urged voters to support or oppose the candidate. The first ad read:

> Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as 13 cents an hour, of a country that routinely violates trade rules flooding our markets, draining American jobs. Now Congress is set to scrap its annual review of China's record and reward China with a permanent trade deal. Tell Congressman Paul to vote 'No' and keep China on probation until this label stands for fairness. Paid for by the AFL-CIO.[8]

Senator McConnell's brief also included the following ad, which urged voters to contact a candidate without expressly criticizing the candidate's position:

> It's almost too much to swallow. Year after year the federal government takes a bigger piece of the pie. In fact in 1998 we'll pay more in federal taxes than at any time in American history except for World War II. And now with the budget surplus, in thirty years all the Washington politicians can talk about is getting their hands on more of your dough. Call Harry Reid and John Ensign tell them no matter who goes to Washington you want them to cut

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viewers to contact candidates and express support for or opposition to legislation or policy positions").

[8] Brief for Appellants/Cross-Appellees Senator Mitch McConnell 51, *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1674).

> your taxes. Otherwise they'll be nothing left but the crumbs.[9]

Responding to the challengers' argument that such electioneering communications did not implicate Congress's compelling interest, this Court explained that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during [the 30- and 60-day periods preceding federal primary and general elections] if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. Reviewing the record, this Court concluded that the "the vast majority of ads clearly had such a purpose." *Id.* Moreover, the record established that political parties and candidates appreciated the "issue advocacy" run by nonprofit corporations and directed donors to support such activities. *Id.* at 129. Indeed, the testimony of campaign professionals demonstrated that these so-called "issue ads" represented the most effective type of campaign advertising. *Id.* at 126-127. In short, having considered arguments and exemplary ads indistinguishable from those presented here, this Court both concluded that electioneering communications implicate Congress's compelling interest in preventing corporations from influencing federal elections and rejected the contention that BCRA's definition of "electioneering communications" is too broad because it encompasses such ads.

In any event, the Court found that corporations' ability to finance such ads with funds from segregated PAC funds undermined the contention that § 441b impermissibly burdened corporate speech. *Id.* at 204-206. Acknowledging the possibility that the definition of "electioneering communications" might cover some unidentified genuine issue ads, this Court concluded that this possibility did not cast doubt on § 441b's constitutionality because "corporations and unions may finance genuine issue ads during those time frames by

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[9] Appendix to Brief for Appellants/Cross-Appellees Senator Mitch McConnell 4A, *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1674).

simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206. In sum, *McConnell* upheld § 441b for two reasons: First, the overwhelming majority of ads covered by the electioneering communications test—like the ads at issue here—are designed to, and in fact do, influence a federal election. Second, in close cases where the intent or effect of the ad is less clear, corporations may continue to run such ads by financing them with funds from a segregated PAC fund—as WRTL was free to do.

II. SECTION 441b CONSTITUTIONALLY APPLIES TO WRTL'S THREE ADS.

This Court's decision in *McConnell* effectively forecloses this as-applied challenge. *McConnell* precludes a corporation from arguing that its speech is entitled to more protection than express advocacy or other types of electioneering communications that Congress clearly may regulate within the bounds of the First Amendment. *See* 540 U.S. at 205. Moreover, *McConnell* conclusively establishes that Congress has a compelling interest in applying § 441b's source restrictions to any ads that are intended to influence a federal election and would almost certainly have that effect. *See id.* at 206. As with the ads this Court considered in *McConnell*, there can be no doubt that the advertisements at issue here had the purpose and likely effect of influencing a federal election. And, as in *McConnell*, any doubt that might have existed regarding the nature of these ads could easily have been avoided "by paying for the ad from a segregated fund." 540 U.S. at 206.

A. WRTL's Ads Deserve The Same Degree Of Constitutional Protection As Ads Expressly Advocating A Candidate's Election Or Defeat.

Although WRTL and its *amici* spill considerable ink arguing the First Amendment value of WRTL's ads, the issue in this case is not whether WRTL's ads constitute speech that is worthy of constitutional protection. This Court's determination that Congress may constitutionally regulate

both express advocacy and electioneering communications did not rest on any notion that such speech lacked constitutional value. *See McConnell*, 540 U.S. at 205. Unlike the challengers here, the *McConnell* plaintiffs did not even attempt to "contend that the speech involved in so-called issue advocacy is any more core political speech than are words of express advocacy." *Id.* Indeed, this Court confirmed that ads expressly advocating a candidate's election or defeat fall within the core of the First Amendment for "'the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office,' and '[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.'" *Id.* (internal citations omitted). WRTL's ads deserve the same level of constitutional protection—no more, no less—that this Court has afforded express advocacy.

Accordingly, WRTL's as-applied challenge must rest not on the ground that its speech is uniquely valuable vis-à-vis express advocacy or other forms of electioneering communications, but on the ground that (1) its ads do not implicate the same compelling interest that led this Court to uphold the corporate source requirements in the context of express advocacy and electioneering communications, and (2) that the segregated-PAC option does not represent a constitutionally sufficient opportunity for WRTL to disseminate its message. Because WRTL's ads had an electioneering purpose and WRTL has an established PAC, this as-applied challenge fails.

B. WRTL's Ads Had An Electioneering Purpose.

It is settled that Congress may require corporations to use segregated PAC funds to finance ads that have an electioneering purpose. *See McConnell*, 540 U.S. at 205-206. In rejecting the notion that Congress's compelling interest in regulating corporate express advocacy did not extend to corporate electioneering communications, this Court stated that "[t]he justifications for the regulation of express advo-

cacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *Id.* at 206. This holding comported with this Court's long-standing recognition that Congress's purpose in § 441b "is to prohibit contributions or expenditures by corporations . . . in connection with federal elections." *National Right to Work*, 459 U.S. at 201. *McConnell* merely reaffirmed that "unusually important interests underlie the regulation of corporations' campaign-related speech." *McConnell*, 540 U.S. at 206 n.88. Corporate electioneering ads fall within the scope of Congress's well-established compelling interest in (1) regulating "'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas,'" and (2) preventing circumvention of valid campaign finance regulations. *Id.* at 205 (quoting *Austin*, 494 U.S. at 660).

WRTL unsuccessfully attempts to characterize the purpose of its ads as "genuine grassroots lobbying," not electioneering. It asserts that its ads only urged voters to call Senator Feingold (a candidate WRTL openly opposed) on the judicial filibuster issue (an issue WRTL used to advocate for Senator Feingold's defeat). Thus, concludes WRTL, "Grassroots lobbying ads . . . have nothing to do with elections." Br. for Appellant 25.

That assertion—which turns on the false premise that any given ad is exclusively either a form of lobbying or electioneering—is not accurate as a general matter and certainly is not credible on the facts of this case. Leading up to the airing of the WRTL ads, WRTL publicized its intention to defeat Senator Feingold in the 2004 election, a clear electioneering purpose. *Amici* Ex. C. Both WRTL and its WRTL-PAC proclaimed that the defeat of Senator Feingold represented one of WRTL's top priorities in the 2004 election. *Id.*; *see also* FEC Ex. 4. In connection with its strategy to defeat Feingold, WRTL openly endorsed all three of Feingold's Republican opponents. FEC Ex. 4. WRTL's

public statements of opposition to Feingold, and its support for Feingold's opponents, emphasized Feingold's position on judicial filibusters as a key justification for opposing Feingold in the 2004 election. *Id.*; *see also Amici* Ex. C; FEC Ex. 16. Moreover, "candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue." J.S. App. 5a (Three-Judge Court's Findings of Fact). Having joined with Feingold's opponents in calling for the senator's defeat because of his support for filibusters, WRTL in its ads pointedly reminded voters that a "group of Senators" was unjustifiably blocking qualified nominees from a confirmation vote and specifically named Senator Feingold as one of two senators voters should contact. *Id.* at 13a-17a. WRTL's so-called "grassroots lobbying" ads failed to include, however, Senator Feingold's phone number or office address. *Id.*

This record establishes that WRTL intended to defeat Feingold, and that it intended to do so on the basis of Feingold's filibuster position when it ran the three ads at issue here. WRTL's ads implemented the organization's electoral strategy by focusing voters' attention on judicial filibusters and tying the need for action on that issue to Senator Feingold, a candidate whose re-election WRTL had repeatedly opposed because of his position on judicial filibusters. In short, WRTL's ads had an electioneering purpose.

WRTL suggests that so-called "lobbying ads" that refer to a candidate for federal office can be easily distinguished from electioneering.[10] That position, however, conflicts not

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[10] WRTL purports to find support for this contention in comments that the principal sponsors of BCRA, including *amici*, submitted to the FEC in the rulemaking implementing Title II of BCRA. Br. for Appellant 24-25 n.19. WRTL fails to note, however, the FEC rejected the proposal, as well as other similar proposals, because it found that they would have exempted communications that "could well be understood to promote, support, attack, or oppose a federal candidate." 67 Fed. Reg. 65,201 (Oct. 23, 2002). Moreover, WRTL erroneously equates a proposed (and rejected) regulatory standard with a constitutional standard. And, in making its argument, WRTL incorrectly equates ads that refer to a specific

just with the facts of this case, but also with this Court's longstanding recognition that electioneering and lobbying often overlap. *See Buckley v. Valeo*, 424 U.S. 1, 42 (1976). As this Court said in Buckley, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.*; *see also McConnell*, 540 U.S. at 126 & n.16.

WRTL asserts that the content of its ads, viewed in a vacuum, reveals no electioneering purpose. But the lesson of this nation's experiment with the express-advocacy test is that corporate ads that identify a candidate and that are run shortly before an election almost always are intended to influence electoral outcomes and do affect elections, even if the ads stop short of explicitly advocating a candidate's election or defeat. *See McConnell*, 540 U.S. at 206. Just as "Congress is not required to ignore historical evidence regarding a particular practice or to view conduct in isolation from its context," *id.* at 153, this Court need not and should not artificially confine its analysis in the manner WRTL suggests, particularly when the surrounding circumstances reveal such an obvious intent to influence a federal election. This Nation's recent experience with the abuse of the "magic words" test leaves no doubt that, if WRTL's proposed exception to § 441b were adopted, it would create a new blueprint for the widespread evasion of the federal campaign finance laws.

C. The Segregated-Fund Option Provides WRTL With A Constitutionally Sufficient Opportunity To Finance Its Ads Without Banning Any Speech By The Corporation.

Section 441b does not prohibit corporations from speaking. Congress has only sought to regulate "the temptation to use corporate funds for political influence" by requiring corporations to finance electioneering communications with

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candidate for office by name—as WRTL sought to do here—with ads that refer generically to "your Congressman" or "your Senator."

funds from a segregated PAC fund. *Beaumont*, 539 U.S. at 163. Accordingly, WRTL and its amici are "simply wrong in characterizing § 441b as a complete ban." *Id.* at 162.

This Court has already concluded that the segregated-fund option provides corporations with a constitutionally sufficient opportunity to finance ads, even when the nature of the corporation's ad is unclear. *McConnell*, 540 U.S. at 206. As *McConnell* reaffirmed, the "Court's unanimous view" has been that "[t]he ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy." *Id.* at 203. Extending this view to electioneering communications, this Court reasoned that, regardless of what percentage of electioneering communications constituted non-electioneering ads in the past, "in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, *or in doubtful cases by paying for the ad from a segregated fund.*" *Id.* at 206 (emphasis added). Thus, even if WRTL's electoral intent in running the three ads were less than clear, § 441b could constitutionally require WRTL to finance its ads with funds from its segregated PAC.

Although WRTL does not dispute that, as a general matter, the segregated fund option represents a constitutionally sufficient alternative, it argues that its own PAC contained insufficient funds to finance these three advertisements. WRTL blames its PAC's fundraising failure on "inadequate time to raise sufficient funds" to finance the three ads at issue here. Br. for Appellant 41. Yet, WRTL knew no later than March 5, 2004, when it announced its plans to defeat Senator Feingold, that it might have a need for PAC expenditures six months in the future. *See* FEC Ex. 4.

This lack of support for WRTL's electoral positions, or WRTL's poor fiscal planning, hardly undermines the adequacy of the PAC alternative or justifies using general treasury funds in place of PAC funds. This Court has never

accepted the notion that the applicability of § 441b can turn on the size of a particular PAC's checkbook. *See Beaumont*, 539 U.S. at 157 ("specifically reject[ing] the argument ... that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations"); *see also Austin*, 494 U.S. at 661 (upholding application of state statute similar to § 441b to all corporations including ones that "may not have accumulated significant amounts of wealth"); *McConnell*, 540 U.S. at 227 ("'[p]olitical "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly the same resources'") (citation omitted). Nor should the Court embrace the idea that the constitutionality of applying § 441b to a particular corporation turns on the corporation's effectiveness at fundraising or its failure to plan ahead. If WRTL's position became law, corporations and labor unions would have the perverse incentive to circumvent § 441b by simply declining to solicit contributions for their PACs.

Aside from the PAC alternative, § 441b also provides corporations with numerous other avenues for disseminating their messages. WRTL could have run the ads at issue if it merely refrained from referring to Senator Feingold. It could have run its ads, and could have used its corporate treasury funds to finance those ads, if it simply used newspapers, billboards, direct mail or any other type of non-broadcast communication medium. And, it could have—and did—use corporate treasury funds to broadcast its ads outside the 60-day period before the general election and the 30-day before the primary election. Rather than avail itself of these alternatives, WRTL sought to use its corporate treasury funds to run broadcast ads that were intended to influence a federal election and, if aired, would almost certainly have done so. Under these circumstances, and this Court's clear holding in *McConnell*, § 441b's segregated fund requirement constitutionally applies to WRTL's advertisements.

D. WRTL And Other Non-Profit Advocacy Corporations Can Avoid § 441b's Requirements Altogether By Declining To Accept Corporate Contributions.

WRTL is subject to § 441b's segregated-fund requirement only because it chooses to accept contributions from corporate treasuries. Under the *MCFL* exemption, non-profit advocacy corporations, like WRTL, may generally use their own corporate treasuries to finance electioneering communications. *See McConnell*, 540 U.S. at 209-211. This exemption does not apply, however, when the non-profit organization receives corporate treasury contributions, for then the non-profit corporation has the potential to "serv[e] as [a] conduit[] for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264.[11]

Repeating an argument unsuccessfully raised by the NRA in *McConnell*,[12] WRTL suggests that this Court should rewrite § 441b to permit WRTL to finance its electioneering communications with funds received from non-corporate contributors without establishing a segregated

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[11] Senator McConnell argues, as an *amicus curiae*, that "small nonprofit corporations often lack the financial resources and manpower necessary to satisfy" the requirements for establishing a PAC. *See* Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Appellant 10-11. Putting aside the fact that WRTL had a PAC—and thus that issue is not before the Court—this Court has repeatedly recognized that the "regulatory burden" of operating a PAC does not give rise to a constitutional problem, except in the limited case of direct expenditures by so-called *MCFL* corporations. *McConnell*, 540 U.S. at 210-211 & n.91; *Beaumont*, 539 U.S. at 163; *National Right to Work*, 459 U.S. at 201-202. The argument also ignores the fact that a non-profit organization that is "formed for the express purpose of promoting political ideas" can avoid the relatively minimal burden of creating a PAC by declining to accept corporate contributions, and thus avoiding the risk that it will be used as a conduit for unlawful electioneering. *MCFL*, 479 U.S. at 264.

[12] Brief for Appellants The National Rifle Association at 28-33, *National Rifle Association v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1675).

PAC fund. Because WRTL did not pay for or seek to pay for its ads with non-corporate dollars, WRTL's proposal amounts to a request for an advisory opinion. Indeed, the record contains no suggestion that WRTL ever segregated its corporate from its non-corporate funds. In any event, money under these circumstances is fungible, and segregating non-corporate funds will not prevent WRTL from indirectly using corporate funds to finance electioneering communications. In short, there is no factual basis here for any as-applied challenge based upon the type of funds used to finance WRTL's ads.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal From
The United States District Court
For The District Of Columbia

BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether the prohibition on corporate disbursements for "electioneering communications" during a statutorily imposed black-out period, codified at 2 U.S.C. § 441b, is unconstitutional as applied to television advertisements that are devoted exclusively to urging constituents to contact named elected officials regarding pending governmental matters.

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BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether the prohibition on "electioneering communications," codified at 2 U.S.C. § 441b, is unconstitutional as applied to grass-roots lobbying. The First Amendment is essential to the vitality and legitimacy of our political process. *Amicus*—a long-time advocate of First Amendment protection for political speech, and an elected official with a vital personal stake in the health of our political system—has a significant interest in the resolution of this question.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and the Senate Majority Whip. He also is the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. During his four terms in the Senate, Senator McConnell has been one of the Senate's foremost champions of vigorous political debate and has consistently argued that restrictions upon free speech are constitutionally doubtful and will undermine popular participation in government. *See, e.g.*, Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17; Mitch McConnell, *"Reform" Hurts Freedoms*, USA TODAY, Mar. 23, 2001, at A16.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Senator McConnell's strongly held beliefs about the meaning of the First Amendment and the importance of robust political debate led him to challenge the constitutionality of the Bipartisan Campaign Reform Act of 2002 shortly after its enactment. *See McConnell v. FEC*, 540 U.S. 93 (2003). He also has participated as *amicus curiae* in several other cases contesting the validity of restrictions on political speech.[2] Senator McConnell's position as a United States Senator and his extensive experience with campaign finance legislation give him unique insight into the constitutional infirmities presented by the Bipartisan Campaign Reform Act's application to the grass-roots lobbying efforts at issue here.

STATEMENT

1. In 2002, Congress passed—and the President signed—the Bipartisan Campaign Reform Act ("BCRA"), which amended the Federal Election Campaign Act of 1971 ("FECA") to curb corruption or the appearance of corruption in federal elections. *See McConnell*, 540 U.S. at 115 (calling BCRA the most recent federal enactment designed to "purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions" (citing *United States v. Auto. Workers*, 352 U.S. 567, 572 (1957))). When signing BCRA into law, President Bush cautioned that several of its provisions "present serious constitutional concerns." Press Release, Office of the Press Secretary, Presi-

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[2] *See* Brief of Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Republican Senatorial Committee, as *Amici Curiae* in Support of Respondents, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963); Brief of Washington Legal Foundation, Fair Government Foundation, Allied Educational Foundation; U.S. Senators Alfonse M. D'Amato, Mitch McConnell; U.S. Representatives Henry J. Hyde, Bob Livingston, Joe Barton, Bob Walker; Bill Frenxel and Eugene McCarty, as *Amici Curiae* in Support of Petitioners, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 614 (1996) (No. 95-489).

dent Signs Campaign Finance Reform Act (Mar. 27, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/03/20020327.html [hereinafter Presidential Signing Statement]. The President expressed specific "reservations about the constitutionality of [BCRA § 203's] broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election." *Id.*

A year later, this Court upheld most of BCRA's provisions, and considered—and rejected—a facial challenge to BCRA § 203's restrictions on issue advertising. *McConnell*, 540 U.S. at 207. That provision prohibits any corporation from "mak[ing] a contribution or expenditure in connection with any election to any political office, or in connection with any primary election . . . for any political office." 2 U.S.C. § 441b(a). The terms "contribution" and "expenditure" are defined to include "electioneering communications." *Id.* § 441b(b)(2).

An "electioneering communication," in turn, is defined as any broadcast, cable, or satellite communication that (i) refers to any clearly identified federal candidate; (ii) is made within 30 days of a primary or 60 days of a general election; and (iii) is targeted to the electorate of the identified candidate. 2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29(b)(2) (explaining that "[r]efers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears"). Once these provisions are triggered, a corporation "may not use [its] general treasury funds to finance electioneering communications"; if it intends to run advertisements referring to particular federal officeholders during this black-out period, it must first create a distinct organization—a separate segregated fund (or PAC)—in order to speak. *McConnell*, 540 U.S. at 204; *see also* 2 U.S.C.

§ 441b(b)(2)(A)-(C).[3] BCRA § 203 thus extended FECA's existing restrictions on "express advocacy," which applied to corporate-funded advertisements that explicitly advocated a candidate's election or defeat, to electioneering issue advertisements, which did not expressly advocate a vote for or against a candidate. *McConnell*, 540 U.S. at 193-94.

In *McConnell*, the parties challenging BCRA's constitutionality argued that § 203's restriction on electioneering communications was substantially overbroad and thus facially unconstitutional. 540 U.S. at 204. The Court rejected this facial challenge because it believed that "the vast majority" of issue ads aired during the weeks immediately preceding an election served an electioneering purpose (*id.* at 206) and that restrictions on such ads were necessary to combat the potentially distorting impact of corporate wealth on elections. *Id.* at 205. The Court explained that the "justifications for the regulation of express advocacy apply equally to [issue] ads aired during those periods *if* the ads are intended to influence the voters' decisions *and* have that effect." *Id.* at 206 (emphases added). The Court recognized that restrictions on issue ads that are *not* intended to serve an electioneering purpose are constitutionally suspect and are thus amenable to an as-applied challenge. *See id.* at 206 n.88 ("interests that justify the regulation of campaign speech might not apply to the regulation of . . . issue ads" that do not serve an electioneering function). This Court is now squarely confronted with the as-applied constitutional challenge that *McConnell* invited for another day.

2. During the summer of 2004, Wisconsin Right To Life, Inc. ("WRTL"), a nonprofit, 501(c) tax-exempt Wiscon-

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[3] Section 441b(b)(2)(C) provides that "the term 'contribution or expenditure' . . . shall not include the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock."

sin corporation, ran a series of advertisements urging Wisconsin residents to lobby United States Senators Feingold and Kohl to oppose filibusters of judicial nominees. *See* Jurisdictional Statement ("J.S.") at 4-5. As is the case today, the filibuster issue was then receiving significant national attention, and there was a vigorous public debate about the judicial confirmation process.

WRTL's lobbying campaign did not reference the Senators' party affiliations, their voting records, or their personal lives. *See* Jurisdictional Statement Appendix ("J.S.A.") at 13a-17a. In fact, the ads mentioned the Senators' names only once, concluding with the suggestion that listeners "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *See id.* at 13a, 15a, 17a (wording of three filibuster ads). It is undisputed that, because the ads made reference to Senator Feingold, who was then seeking re-election, they fell within the plain terms of BCRA's electioneering communications provisions for approximately a two-and-a-half-month period, beginning August 15, 2004. J.S. at 4.[4]

3. On July 28, 2004, WRTL filed suit in the United States District Court for the District of Columbia and sought a preliminary injunction allowing it to continue running the filibuster ads with general treasury funds during the statutorily imposed black-out period. J.S. at 4. A three-judge panel was convened pursuant to BCRA § 403(a)(1). The court denied WRTL's preliminary injunction request on August 12 and subsequently dismissed WRTL's complaint with prejudice. J.S.A. at 2a-4a.

The three-judge panel's opinion denying WRTL's request for injunctive relief interpreted *McConnell* as precluding all as-applied challenges to BCRA's electioneering com-

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[4] Because Senator Feingold was a candidate in the September 14 primary and the November 2 general election, WRTL was prohibited from running the filibuster ads from August 15 to November 2, 2004.

munications provisions. J.S.A. at 8a. The court also opined that WRTL had not established its entitlement to a preliminary injunction on the merits. *Id.* In reaching this conclusion, the court suggested that WRTL's ads were the very type of activity that *McConnell* found Congress had a compelling interest in regulating. *Id.* at 8a-9a. Specifically, the court expressed concern that grass-roots issue ads focused on filibustering—arguably an issue in Senator Feingold's re-election campaign—could "convey a message of support or opposition regarding candidates." *Id.* at 9a (internal quotation marks omitted).

The court opined that because WRTL could conceivably finance its filibuster ads with PAC funds, it would not suffer irreparable harm if a preliminary injunction were denied. J.S.A. at 10a-11a. The court also found that the Federal Election Commission would suffer a "substantial injury" if it were not able to comply with its statutorily imposed duty to enforce BCRA. *Id.* at 11a. Finally, the court rejected WRTL's contention that an injunction would further the public interest, because this Court had already determined that BCRA facially serves a compelling governmental interest. *Id.*

WRTL filed a notice of appeal and a jurisdictional statement, and this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

This case presents the exceptionally important question whether BCRA § 203's restrictions on electioneering communications can be constitutionally applied to all grass-roots lobbying. This Court's resolution of the issue must give due regard to the essential freedoms embodied in the First Amendment.

In holding that § 203 is facially constitutional, the *McConnell* Court preserved the availability of as-applied challenges to the statute. Indeed, the Court explicitly acknowledged the serious constitutional concerns that would be raised by the application of BCRA's electioneering commu-

nications provisions to genuine issue advocacy. *See McConnell*, 540 U.S. at 206 n.88 ("interests that justify the regulation of campaign speech might not apply to the regulation of . . . issue ads" that do not serve an electioneering purpose); *see also* Presidential Signing Statement (expressing "reservations about the constitutionality of the broad ban on issue advertising"). Because the ability of citizens to express their views is the essence of self-government, BCRA § 203's limitations on grass-roots lobbying are unconstitutional.

The district court erred in denying WRTL's request for an injunction permitting it to run its grass-roots lobbying ads during the statutorily imposed black-out period. Specifically, the district court failed to give adequate weight to the significant First Amendment interests implicated by a grass-roots lobbying campaign. A generalized concern about protecting the integrity of the election process does not justify imposing restrictions upon grass-roots issue advertisements because such restrictions do not further the government's asserted anticorruption interest.

Political speech is obviously "[a]t the core of the First Amendment." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). Grass-roots lobbying, a traditional means of influencing governmental action through citizen participation, fits squarely within the scope of core political speech and is also a manifestation of the people's constitutionally protected right to petition the government. To restrict this class of favored speech, the government must therefore establish that the restriction is narrowly tailored to serve a compelling governmental interest.

This demanding level of scrutiny is warranted because political speech underlies every facet of the American system of government. Without robust political debate, the people cannot govern themselves effectively. Grass-roots lobbying facilitates self-governance by encouraging citizen participation, the exchange of ideas, and—through these mecha-

nisms—citizen education. Open discourse thus serves a consensus-building function, which ensures that "the best" ideas win out in the political marketplace.

The government has not identified a compelling interest sufficient to justify the imposition of BCRA's restrictions on grass-roots lobbying advertisements during the weeks immediately preceding an election, when constituents are most receptive to political ads and Congress is often at the height of its legislative activity. A desire to insulate incumbents from public scrutiny is not a compelling interest that warrants restricting debate on issues of political import.

Grass-roots issue advertisements are not functionally equivalent to electioneering issue advertisements because grass-roots issue ads do not urge a candidate's election or defeat, either in appearance or actuality. Indeed, the only link between grass-roots issue ads and elections is the fact that such ads are run during the time frame immediately preceding an election, and that they exhort citizens to contact named elected officials with respect to pending legislative or executive matters.

This Court should consider this case against the backdrop of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Restricting grass-roots lobbying efforts would silence core political speech that is integral to the functioning of our form of government.

ARGUMENT

I. GRASS-ROOTS LOBBYING IS CORE POLITICAL SPEECH.

The First Amendment embodies this Court's "'profound national commitment to the free exchange of ideas.'" *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686

(1989)). Grass-roots lobbying, which encompasses any communication devoted exclusively to urging support or opposition for pending legislative or executive matters, enables this free exchange of ideas. *Cf.* Electioneering Communications, 67 Fed. Reg. 65,190, 65,201-02 (proposed Oct. 23, 2002) (discussing the wording of the FEC's proposed lobbying exceptions). Such lobbying efforts constitute core political speech essential to our system of government.

This Court has recognized that the First Amendment's protection is "at its zenith" where core political speech is implicated. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Indeed, at the time of the Founding, "Americans generally believed that freedom of thought, belief, and expression were among the natural rights of individuals. These freedoms were also regarded as inherent in republican citizenship, allowing the people to express their views on public affairs and to guard their liberties against governmental encroachment." Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1296 (1998). Thus, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Grass-roots lobbying is a fundamental element of the political discourse that the First Amendment was designed to promote. *See Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). Advertisements run as part of a grass-roots lobbying campaign, or "grass-roots issue ads," seek to influence governmental action by energizing a broad base of support for a particular issue or idea. Regardless of the particular issue involved, all grass-roots lobbying advertisements exhort constituents to contact the very representatives they voted to elect regarding pressing

political issues. WRTL's ads, for example, urged Wisconsin residents to lobby their Senators to oppose the filibustering of judicial nominees. In this way, grass-roots issue ads serve both an education function—informing the public about pending issues—and an accountability function—fostering constituent awareness of governmental action.

When citizens organize to engage in grass-roots lobbying, they are informing, energizing, and persuading one another as well as the persons whom they elected to represent them in Congress. Such "interactive communication concerning political change" rests within the heart of the First Amendment's protections, and the government's efforts to restrict this political discourse are therefore subject to the most searching judicial scrutiny. *Meyer*, 486 U.S. at 422; *see also id.* at 428 (striking down Colorado's prohibition on payment for the circulation of ballot-initiative petitions). This exacting scrutiny is triggered whenever political speech is curtailed, even if alternate means of expression exist. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (although expenditure limitations did not restrict all avenues of speech, "[t]he fact that the statute's practical effect [was] to discourage protected speech [was] sufficient to characterize [the statute] as an infringement upon First Amendment activities").

Moreover, the misguided argument—relied upon by the court below—that corporations can use PAC funds to finance a lobbying effort, is a constitutional red herring. This "alternative" in practical reality suppresses constitutionally protected speech. The use of PAC funds to finance lobbying efforts is not a constitutionally adequate alternative to corporate-funded advertisements because funneling pre-election grass-roots lobbying through a PAC significantly burdens constitutionally protected speech. Establishing a PAC is an extremely complex endeavor—as illustrated by the voluminous guides and regulations that address the topic—and small nonprofit corporations often lack the financial resources and

manpower necessary to satisfy these onerous requirements. Indeed, the FEC's "Campaign Guide for Corporations and Labor Unions" is over 115 pages long,[5] and the federal regulations governing PACs are equally extensive. *See* 11 C.F.R. pt. 102. The difficulty of complying with these requirements is compounded by the fact that corporations seeking to run a grass-roots lobbying campaign with PAC funds must also consult more than thirty years of precedent embodied in advisory opinions and enforcement actions.

In light of the complex regulatory environment, a corporation attempting to establish a PAC must likely consult both an attorney and an accountant. A corporation must also purchase the necessary software to comply with electronic reporting requirements. The PAC start-up costs can thus total hundreds of thousands of dollars. These costs are imposed regardless of whether the corporation is a multibillion dollar operation or a small, unsophisticated nonprofit struggling to promote a particular agenda. *See Mass. Citizens for Life*, 479 U.S. at 254 (expressing concern that small entities may be unable to bear the administrative costs of running a PAC). Moreover, even if a nonprofit corporation overcomes the financial and procedural obstacles to establishing a PAC, funding restrictions still inhibit a nonprofit's ability to finance a grass-roots lobbying campaign with PAC money. Indeed, such financial constraints forced WRTL to discontinue its grass-roots lobbying initiative during BCRA's statutorily imposed black-out period. *See* J.S. at 6-7.

The black-out period restricts a nonprofit corporation's ability to run issue advocacy campaigns in the days immediately preceding an election, which is the period when the public is most receptive to political advertisements and when ads urging constituents to contact their elected officials are most

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[5] FEC, Campaign Guide for Corporations and Labor Unions, *available at* http://www.fec.gov/pdf/colagui.pdf.

effective. This is also the time frame when Congress is most likely to be addressing major issues affecting United States citizens. *See* Presidential Signing Statement (highlighting the "serious constitutional concerns" raised by BCRA's restrictions on speech about "issues of public import in the months closest to an election"). Because core First Amendment speech is restricted, the government must demonstrate that BCRA's electioneering communications provisions are narrowly tailored to further a compelling interest. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990). In light of the critical First Amendment values associated with grass-roots lobbying, the government cannot meet this heavy burden.

A. Grass-Roots Lobbying Is Protected Under The Petition Clause Of The First Amendment.

The First Amendment protects the exchange of ideas between citizens and their elected officials. The Petition Clause promotes popular sovereignty by ensuring that the people can make their opinions known to their elected representatives. *See* Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 730 (2002). The right of the people to assemble peaceably and to petition the government for a redress of grievances is but one aspect of the broader right of the people to "communicate their will to their government." Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 673-74 (2000).

James Madison discussed the manner in which the Petition Clause interrelates with the Speech and Press Clauses to protect the people's right to communicate with the government:

> The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this government; *the people may therefore publicly address their repre-*

> *sentatives*, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will.

House Debates (Aug. 15, 1789) (emphasis added), *reprinted in* Andrews, *supra*, at 800 n.32.

The right to petition at any time is a fundamental feature of American government. *See generally* Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149, 180 (1993) (surveying the history of the Petition Clause). Historically, the right to petition traces its roots to the Magna Carta, which formally recognized the concept that "'the king was the source of justice and that in providing this justice he and his government must be accessible to all.'" *Id.* at 181-82 (quoting RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 9 (1979)). Early Americans regarded the right as "implied in the very nature of republican government and as a birthright worthy of constitutional protection both at the federal and state level." *Id.* at 182 (internal quotation marks omitted).

The Petition Clause has been interpreted to protect a variety of activities, including the right of access to the courts, the right to engage in nonviolent political boycotts, and—most importantly—the right of the people to lobby their elected representatives. *See McDonald v. Smith*, 472 U.S. 479, 484 (1985) (lawsuits); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982) (nonviolent political boycotts); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) (lobbying legislators).

The right to petition would be illusory, however, without the companion rights of association and assembly. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in

respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). The rights of assembly and association are, to a large extent, interrelated. *See, e.g.*, David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 226 (1999).[6] These rights are so vital that "it is impossible to imagine a democratic society—much less the First Amendment rights of speech, assembly, religion, and petition—without a corresponding right of association." *Id.* at 203. Specifically, both the right to assemble and the right of association give meaning to the right to petition. They work together to ensure that the people's voice is heard by their elected officials. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Here, association and assembly amplify the viewpoints of individuals by coordinating their message to the government. Indeed, the "freedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively." *United States v. Eichman*, 496 U.S. 310, 322 (1990) (Stevens, J., dissenting). BCRA's electioneering communications provisions, however, impede nonprofit corporations' ability to amplify the voices of their members and like-minded citizens on issues of political import.

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[6] "[W]hile the right of association is not literally mentioned in the Constitution, it nevertheless finds solid textual support in the First Amendment as the modern-day manifestation of the right of assembly." Cole, *supra*, at 226. Indeed, this Court has declared that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

The ability to influence the government through lobbying is central to the American system. Although this Court has never expressly defined the scope of protection afforded lobbying activity under the Petition Clause, it has explicitly recognized that lobbying is protected. Specifically, this Court concluded in *Noerr* that First Amendment considerations protected advertising activity undertaken by a paid, professional lobbying organization. In *Noerr*, truck operators and their trade associations asserted that an association of railroads violated the Sherman Antitrust Act when it engaged a public relations firm to orchestrate a publicity campaign designed to influence legislation adverse to the trucking industry. 365 U.S. at 129. This Court concluded that the Sherman Act's history did not evidence an intent to regulate political action, and it therefore found no antitrust violation. The Court reiterated that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138; *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring) ("lobbying is protected by the First Amendment"). This Court further explained that "[i]n a representative democracy such as this, the[] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr*, 365 U.S. at 137.[7] This principle holds true during the entire year, not just the 75% of the year that falls outside of the statutory black-out period.

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[7] *Noerr*'s holding was grounded in an interpretation of the Sherman Act. It is clear, however, that First Amendment considerations greatly influenced this Court's analysis. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (noting that the *Noerr* Court interpreted the Sherman Act "in the light of the First Amendment").

Noerr recognizes the rights of a for-hire lobbying organization to petition the government; *a fortiori*, a grass-roots lobbying campaign run by a corporation dedicated to promoting an identified social cause is also entitled to protection.

B. Grass-Roots Lobbying Is Integral To Self-Governance.

Political speech must be safeguarded year-round because it is a necessary component of representative government. Because *the people*, rather than their elected representatives, are sovereign, political speech is accorded the highest level of First Amendment protection. "The First Amendment bars the state from imposing upon its citizens an authoritative vision of truth. It prohibits the state from interfering with the communicative processes through which its citizens exercise and prepare to exercise their rights of self-government." *Herbert v. Lando*, 441 U.S. 153, 184-85 (1979) (footnote omitted). All other precepts logically follow from the recognition that "we the people" are sovereign. The First Amendment's protection of political speech is essential precisely because it facilitates the ability of the people to self-govern. *See Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"). Political speech, including grass-roots lobbying, serves two complementary yet distinct functions: an accountability function and an education function.

Free speech is a necessary component of a government of the people, in which "it should be possible to trace without much difficulty a line of authority for the making of governmental decisions back to the people themselves." STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15 (2005). The sovereignty of the people is threatened, however, when "law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials." *Id.* at 42. WRTL's filibuster campaign

falls squarely within this category of speech and should therefore be accorded the highest protection. BCRA's electioneering communications provisions not only restricted WRTL's ability to inform public opinion, but also significantly impeded WRTL's efforts to engage in public discourse on an important political issue. Unrestrained political speech on subjects such as the propriety of judicial filibusters is necessary to protect the people's sovereignty against encroachment by elected officials.

Thomas Jefferson acknowledged that if the people "become inattentive to the public affairs, you and I, and Congress, and Assemblies, judges and governors shall all become wolves . . . experience declares that man is the only animal which devours his own kind, for I can apply no milder term to the governments of Europe." Letter from Thomas Jefferson, to Edward Carrington (Jan. 16, 1787), *reprinted in* THE FOUNDERS' CONSTITUTION 122 (Philip B. Kurland & Ralph Lerner eds., 1987). By encouraging public debate, grass-roots lobbying brings a transparency to governmental affairs that is critical to the political system's survival. The transparency that grass-roots lobbying fosters should not be restricted during the critical period preceding an election. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Because grass-roots lobbying fosters an awareness of what the people's representatives are doing, it enables the people to hold their elected representatives accountable for their political choices. Self-governance presupposes that the electorate is informed about the positions of their elected officials, pending legislation, and potential social policy. As James Madison explained, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever gov-

ern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

Free speech's accountability function is thus closely related to its education function. Only through debate and the free exchange of ideas can citizens share the knowledge with each other that is necessary for the people to govern effectively. Grass-roots lobbying is a powerful form of political speech that fulfills this education function by informing and energizing the people about pending political issues. These issues—which may or may not be campaign issues—are important social questions that affect the fabric of American society and that warrant free and open debate. Public discussion about such core political issues is not merely a privilege: "public discussion is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The fact that a nonprofit corporation, rather than an individual, initiates a debate does not lessen the speech's value. As this Court has recognized, protection of speech is predicated upon the intrinsic value of the speech itself, rather than upon the identity of the speaker. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

C. Grass-Roots Lobbying Is Integral To The Marketplace Of Ideas.

The value of free speech as a means of educating the public is closely tied to the notion that the First Amendment promotes and protects the "marketplace of ideas." Indeed, Justice Holmes argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Speech should be protected because,

"[i]f the opinion is right, [the people are] deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error." JOHN STEWART MILL, ON LIBERTY 20 (Stefani Collini ed., Cambridge Univ. Press 1989) (1859).

The marketplace of ideas envisioned by the Framers is founded upon open, confrontational, and pointed discourse. "Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (internal quotation marks omitted). First Amendment protection of participation in the political marketplace also necessarily encompasses a protected right to *hear*, and it is up to the individual to choose whether to listen. "[I]t would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). Grass-roots lobbying, as core political speech, is essential to this marketplace.

The marketplace is valued, not because it necessarily leads to a determination of "absolute truth," but rather for the integrity of its process. Justice Holmes opined that "[s]uch matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).[8] Grass-roots lobbying serves a vital purpose because

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[8] Alexander Meiklejohn recognized that "[i]t is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948). Universal suffrage is of little value, however, without the open political discourse that fosters voters' awareness of pertinent arguments and information. If the best test of truth is the power of an idea to gain acceptance in the marketplace, then in the long run the

it ensures that ideas enter the marketplace. Once in the marketplace, the ideas are vigorously debated, thereby building consensus among the people as to policy and legislation.

D. Grass-Roots Lobbying Enables All Segments Of The Population To Engage In The Political Process.

To the extent that citizens are denied access to information regarding issues pending before Congress, BCRA § 203 effectively undermines the goal of an informed electorate and thus weakens the political process. By targeting radio and television ads, the statute silences the most effective means of communicating with a large audience. Indeed,

> [t]elevision is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information . . . to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the [entity imposing these restrictions] can accurately forecast the kind of information that the public would regard as relevant.

MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 3 (discussing restrictions upon attorney advertising). Although the electorate may receive information on pending legislation from other sources, they will be denied full access to the marketplace of ideas if issue advertisements are restricted.[9] BCRA's restric-

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[Footnote continued from previous page]

best test of intelligent political policy is its power to gain acceptance at the ballot box. *See* RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2.34 (2005).

[9] The news media are no substitute for grass-roots lobbying efforts because journalists and the corporations for which they work are themselves

tions are especially pernicious because they prohibit the broadcast of corporate-funded issue ads during the weeks immediately preceding an election, when the public is most likely to pay attention to political advertisements and members of Congress are most likely to pay attention to lobbying efforts.

II. GRASS-ROOTS LOBBYING EFFORTS DO NOT PRESENT THE SAME CONCERNS THAT LED THIS COURT TO REJECT A FACIAL CHALLENGE TO BCRA'S ELECTIONEERING COMMUNICATIONS PROVISIONS.

Grass-roots lobbying is core political speech that plays a critical role in maintaining our system of government. Only a compelling interest can justify restricting this class of speech. The government cannot meet this burden when applying BCRA § 203 to grass-roots lobbying.

BCRA's electioneering communications provisions were designed to combat the proliferation of corporate-funded electioneering issue advertisements, which praise or denounce a candidate for public office without expressly urging the candidate's election or defeat. *McConnell*, 540 U.S. at 205-06. Because advertisements run during a grass-roots

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special interest groups that wield tremendous political influence. *See* Mitch McConnell, *Speech Limits Are Not Reform*, USA TODAY, Feb. 26, 2002, at A13; Mitch McConnell, *Why Are Media Exempt?*, USA TODAY, Mar. 19, 2002, at A14. Although the average American's speech is subject to BCRA's restrictions, corporations that control the news media are free to engage in "political proselytizing." *Id.*; *see also id.* (noting that General Electric owns NBC); 2 U.S.C. § 431(9)(B)(i) (excluding from BCRA's restrictions "any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee or candidate").

lobbying campaign, or "grass-roots issue ads," are not functionally equivalent to electioneering issue ads, the anticorruption considerations motivating this Court to uphold BCRA § 203 on its face are inapplicable here.

Prior to BCRA's enactment, FECA's expenditure limitations and disclosure and reporting requirements applied only to communications that expressly advocated the election or defeat of a clearly identified candidate. *See McConnell*, 540 U.S. at 126. Unlike such "express advocacy" communications, "issue advocacy" was not regulated by federal election laws. Under this system, an advocate could run an electioneering issue ad condemning an incumbent's record "before exhorting viewers to call Jane Doe and tell her what you think." *Id.* at 127 (internal quotation marks omitted).

The *McConnell* Court's analysis of BCRA's electioneering communications provisions was informed by this history and thus was focused upon electioneering issue ads, or issue ads that were "functionally identical" to express advocacy. 540 U.S. at 126. "Both were used to advocate the election or defeat of clearly identified candidates, even though the so-called issue ads eschewed the use of magic words." *Id.* This Court assumed that the "vast majority" of issue ads run during the black-out period had an electioneering purpose, and rejected a facial challenge to BCRA § 203's prohibition on the use of corporate funds to finance electioneering communications. *See id.* at 206. The Court also upheld § 204's restriction on not-for-profit corporations' use of general treasury funds to pay for electioneering communications. *See id.* at 211. In so doing, however, the Court acknowledged that the rationale for restricting electioneering issue ads is inapplicable to grass-roots issue ads that are not designed to serve an electioneering purpose. *See id.* at 206 ("justifications for the regulation of express advocacy apply equally to [issue] ads aired during those periods *if* the ads are intended to influence the voters' decisions *and* have that effect" (emphases added)).

Indeed, unlike electioneering issue ads, grass-roots issue advocacy by a nonprofit, issue-oriented citizens' group like WRTL does not raise the two broad concerns that troubled the *McConnell* Court: the distorting effect of corporate wealth on the political marketplace and the use of issue ads intended to serve an electioneering purpose to circumvent funding restrictions imposed on express advocacy ads. *See* 540 U.S. at 206 n.88 ("interests that justify the regulation of campaign speech might not apply to the regulation of . . . issue ads" that do not serve an electioneering purpose).

This Court has observed that the regulation of corporate political activity is permissible to combat the "unfair deployment" of wealth for political purposes. *See, e.g., Mass. Citizens for Life*, 479 U.S. at 259; *cf. Austin*, 494 U.S. at 460 (expressing concern about the "use of immense aggregations of wealth that are accumulated with the help of the corporate form and that may bear no relation to the corporation's speech activity"). But any concerns that this Court may have about the perceived distorting impact of corporate wealth on the political process are inapplicable when the speaker is—like WRTL—a nonprofit organization. Indeed, WRTL was "formed to disseminate political ideas, not to amass capital. The resources that it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *Mass. Citizens for Life*, 479 U.S. at 259. Individuals who contribute financial support to WRTL are fully aware of the public policy issues about which WRTL is concerned.

Moreover, the *McConnell* Court's observation that electioneering issue ads were being used to evade the restrictions imposed upon express advocacy communications is also inapplicable to WRTL's grass-roots initiative. Asking constituents to contact a named politician—even when the politician's name is tied to a controversial campaign issue—is not functionally equivalent to electioneering advocacy and thus does not present the same concerns that motivated the

McConnell Court to reject a facial challenge to BCRA's electioneering communications provisions. The fact that a nonprofit organization's commercial mentions the name of an incumbent does not inextricably lead to the conclusion that the ad advocates a candidate's election or defeat. This is especially true given the changing face of political discourse. Political television advertisements, which were once run only in the weeks preceding elections, are now run year-round and focus on a variety of issues. Editorial, *Year-Round Political Ads?; The Campaign to Persuade Is Never Ending, Alas*, PITTSBURG POST-GAZETTE, Aug. 2, 2005, at B-6. "These days, conservatives and liberals have taken to the airwaves with a near-constant barrage of ads aimed at persuading voters and politicians to support their views." *Id.*

Judge Leon's opinion in the *McConnell* district court proceedings identified several instances where it would be "helpful, if not necessary, to mention a candidate's name in . . . advertisements" during the black-out period for non-electioneering purposes. 251 F. Supp. 2d at 794. One example to which Judge Leon referred was an issue ad urging constituents to contact an elected official and to communicate a specific policy position on pending legislation. He also referenced a statement by Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, "explaining that it is often necessary to refer to a federal candidate by name because the express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." *Id.* (citations omitted). The effectiveness of a grass-roots initiative is irreparably undermined if viewers are not told whom they should contact with their positions. BCRA's electioneering communications provisions do just that by prohibiting the ads from offering even generic instructions to contact "your Senator" or "your Congressman."

BCRA stipulates that a federal candidate is "clearly identified" for the purpose of triggering the electioneering communications provisions if the name, or a photograph or drawing, of the candidate appears in the advertisement, or if the identity of the candidate is otherwise apparent by unambiguous reference. 2 U.S.C. § 431(18). The statute does not define the term "unambiguous reference," but, in order to give independent meaning to this clause, it must denote something other than the mere mention of the candidate's name or the depiction of her likeness, otherwise the term is merely redundant. *See United States v. Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992) (declining to adopt a construction that would violate the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect").

A current FEC regulation, 11 C.F.R. § 100.29(b)(2), provides concrete guidance, indicating that unambiguous references to "'the President' or 'your Congressman'" would trigger BCRA.[10] *Id.* As a result, any grass-roots issue advertisement urging constituents to contact an elected official must be immediately discontinued during the statutorily imposed black-out period unless the corporation can secure sufficient alternate funding through its PAC. In many cases where the corporation's PAC funds are inadequate, BCRA's electioneering restrictions will preclude a corporation from running its ads at all. *See* J.S. at 6-7. This is true whether or not the advertising initiative focuses on a "campaign issue"

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[10] The full text of 11 C.F.R. § 100.29(b)(2) provides that "'[r]efers to a clearly identified candidate' means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'"

and is true whether the elected official supports or opposes the initiative.

Ultimately, then, the concerns that motivated this Court to uphold BCRA § 203 on its face are not implicated when a corporation organizes a grass-roots lobbying campaign. The potential for corruption that this Court perceived in connection with electioneering advertisements is minimized even further when, as here, WRTL intends to comply with all applicable disclosure and disclaimer requirements.

Finally, there are significant countervailing First Amendment considerations that weigh strongly in favor of exempting this class of core political speech from BCRA's electioneering communications provisions.

Although BCRA may impact only a small number of grass-roots issue advertisements, this Court has cautioned that it is necessary to be as

> vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.

Mass. Citizens for Life, Inc., 479 U.S. at 264-65. As applied to nonprofit corporations' grass-roots lobbying generally, BCRA § 203 sweeps more broadly than is necessary to accomplish the government's anticorruption objective, and its application in this setting is therefore unconstitutional.

* * *

A nonprofit organization's grass-roots lobbying campaign does not pose the threat of corruption that prompted Congress to enact BCRA's electioneering communications provisions. It is therefore appropriate for this Court to conduct a searching review of the as-applied constitutionality of

these provisions. Indeed, President Bush entreated this Court to do just that when signing BCRA into law, noting that he had "reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election." Presidential Signing Statement. Because courts "properly look to presidential signing statements to assist in the interpretation of statutes," 14 Op. Off. Legal Counsel 84, 91 n.9 (1990), this Court should accord substantial weight to the President's concerns about the constitutionality of BCRA's issue advertising restrictions.

This Court has cautioned that its "pursuit of other governmental ends . . . may tempt [it] to accept in small increments a loss that would be unthinkable if inflicted all at once." *Mass. Citizens for Life, Inc.*, 479 U.S. at 264-65. This case calls upon the Court to act as a bulwark against the gradual erosion of the fundamental freedoms embodied in the First Amendment. Indeed, freedom of speech is the "indispensable condition[] of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). Political speech, in particular, is the "essence of self-government," *Garrison*, 379 U.S. at 75, and must therefore be vigilantly protected against legislative and judicial encroachment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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No. 04-1581

IN THE
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICI CURIAE OF NORMAN ORNSTEIN, THOMAS MANN AND ANTHONY CORRADO IN SUPPORT OF APPELLEE

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BRIEF AMICI CURIAE OF NORMAN ORNSTEIN, THOMAS MANN AND ANTHONY CORRADO IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are three political scientists who have dedicated much of their careers to studying and analyzing Congress, federal elections, campaign finance, and American politics, and who have written extensively, both individually and jointly, on those subjects.[1]

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party. We further note that no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief, except for the Carnegie Corporation of New York, which provided a grant to Dr. Ornstein to support the filing of the brief.

Anthony J. Corrado, Jr., is a Professor of Government at Colby College and Co-Chair of the Board of Trustees of the Campaign Finance Institute. He served as an expert witness in *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), and this Court cited and quoted his expert statement in its opinion in that case.

Thomas E. Mann is a Senior Fellow in Governance Studies at the Brookings Institution. He served as an expert witness in *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003), and this Court cited and quoted his expert report in its opinion in that case. *See* 540 U.S. at 124 nn.8, 9, 11 & 12; *id.* at 148; *id.* at 155.

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research. He is the founder and director of the Campaign Finance Working Group, a group of scholars and practitioners who helped craft the McCain-Feingold legislation.

Stemming from their expertise and interest in federal elections and campaign finance reform, Dr. Ornstein and Dr. Mann have joined in the filing of briefs *amici curiae* in previous cases before this Court involving election law issues.[2] The instant brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

INTRODUCTION

This case involves an as-applied challenge to Section 203 of the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91-92. That Act overhauled our federal election laws by amending, *inter alia*, the Federal Election Campaign Act of 1971, 2 U.S.C. § 431

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[2] *See Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (Mann & Ornstein); *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93 (2003) (Ornstein); *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, *supra* (Mann); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Mann).

et seq. *See McConnell*, 540 U.S. at 114. Among BCRA's amendments to FECA is a provision prohibiting corporations and unions from financing, with general treasury funds, "electioneering communication[s]"—*i.e.*, those communications referring to a federal office candidate and broadcast within 30 days of a primary or 60 days of a general election in the candidate's jurisdiction. *See* 2 U.S.C. § 441b(b)(2). Two years ago, in *McConnell*, this Court sustained most of BCRA's various provisions against constitutional challenge, including Section 203. *See* 540 U.S. at 203-209. The Court specifically rejected a First Amendment facial challenge to Section 203, holding that the provision was neither fatally overbroad nor fatally underinclusive. *Id.* at 207-208. The impact of that holding lies at the crux of the present appeal.

Appellant Wisconsin Right to Life (WRTL) alleges that it is a non-profit, non-stock ideological advocacy corporation organized under the laws of Wisconsin that the Internal Revenue Service recognizes as tax-exempt under Section 501(c)(4) of the Internal Revenue Code. *See* J.S. App. 4a. WRTL admitted below that it fails to qualify for any recognized exemption that would allow it to fund electioneering communications from its general treasury account because it neither meets the definition of a "qualified nonprofit corporation" under 11 C.F.R. § 114.10 nor fits the exception for 501(c)(4) corporations provided by 2 U.S.C. § 441b(c)(2). *See* J.S. App. 4a-5a. WRTL administers a segregated account for campaign-related activity in the form of a political action committee (PAC). *Id.* at 5a.

In 2004, United States Senator Russell Feingold of Wisconsin ran for reelection. *See id.* Senator Feingold's challengers raised his support for "filibusters" of the President's nominees for federal judgeships as a campaign issue. *Id.* In March 2004, WRTL's PAC endorsed three candidates opposing Senator Feingold and "announced that the defeat of Senator Feingold was a priority." *Id.* On July 14, 2004, WRTL issued a news release criticizing Senator Feingold's "record on Senate filibusters against judicial nominees." *Id.*

WRTL used a variety of non-broadcast communications to criticize Senate filibusters of judicial nominees. *See id.*

On July 26, 2004, WRTL began using its general treasury funds—rather than its PAC funds—to air three broadcast advertisements criticizing Senators' reliance on the judicial filibuster tactic and naming Senator Feingold. *See id.* at 5a-6a. In the "Wedding" advertisement, the listener hears a father interrupting his daughter's wedding ceremony to "share a few tips on how to properly install drywall." *Id.* at 13a. This set up is followed by the narrator opining that "[s]ometimes it's just not fair to delay an important decision" but, in Washington, "a group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote." *Id.* The narrator then urges the listener to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* WRTL's broadcast advertisements feature different plots but all three play on the same needless-delay theme and essentially convey the same message. *See id.* at 15a ("Loan"); *id.* at 17a ("Waiting").

Anticipating that airing these three advertisements constituted "electioneering communication[s]" under BCRA during the period between August 15, 2004, and November 2, 2004, WRTL filed suit against the Federal Election Commission in federal district court. *Id.* at 5a. WRTL alleged that BCRA's prohibition on the use of general treasury funds to finance electioneering communications is unconstitutional as applied to the funding of its broadcast advertisements and moved for a preliminary injunction. *Id.* at 6a.

The District Court denied WRTL's motion for preliminary injunction, concluding that WRTL's "showing" failed to meet the standard for granting such relief. *Id.* at 7a; *see also id.* at 11a ("[P]laintiff's case falls far short of the four-part test for the grant of a preliminary injunction."). As to WRTL's likelihood of success of the merits of its suit, the District Court concluded that this Court's rejection of a facial constitutional challenge to BCRA Section 203 "[j]ust last year" *in McConnell* "leaves no room for the kind of 'as applied' challenge that WRTL propounds." *Id.* at 7a. The

District Court drew this inference from the fact that the *McConnell* Court declined to consider the "back up" definition of "electioneering communication" that BCRA provided (in the event the primary definition of that term were deemed "constitutionally insufficient") once it " '*uph[e]ld all applications of the primary definition.*' " *Id.* (quoting *McConnell*, 540 U.S. at 190 n.73) (emphasis and brackets by the District Court). "The Court's deliberate declaration of its ruling as encompassing '*all applications* of the primary definition,' " the District Court reasoned, "suggests little likelihood of success for an 'as applied' challenge to some applications of that definition, such as the one plaintiff brings before us." J.S. App. 7a (quoting *McConnell*, 540 U.S. at 190 n.73) (emphasis and brackets by the District Court).

The District Court found that the stock it put in the Court's declaration was buttressed by the fact that Section 203 was not among the four BCRA sections that the Court identified as possibly subject to future as-applied constitutional challenges. *See id.* at 7a-8a. According to the District Court, "the Court's deliberate upholding of 'all applications' stands in informative contrast to its explicit acknowledgement that other parts of the statute which it upheld against facial challenge might be subject to 'as applied challenges' in the future." *Id.* at 7a. While it recognized that the Court's omission did not "preclude the possibility" of an as-applied challenge to Section 203, the District Court concluded that, "in the face of the strength of the Court's holding with specific reference to these [other] provisions, we cannot possibly conclude that the plaintiff has made out a substantial likelihood of success on the merits." *Id.* at 8a.

The District Court's reading of this Court's decision in *McConnell*, however, was "but one reason" that it declined to find that WRTL's suit had any likelihood of success on the merits. *Id.* The District Court went on to observe that the facts involved in WRTL's as-applied challenge "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* The District Court explained that WRTL's advertisements seemed to confirm

the *McConnell* Court's suspicion that corporate funding of pre-election broadcast advertisements " 'will *often* convey [a] message of support or opposition' regarding candidates." *Id.* at 8a-9a (quoting *McConnell*, 540 U.S. at 239) (emphasis in *McConnell*) (brackets by the District Court). "Here, WRTL and WRTL's PAC used other print media and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media." J.S. App. 9a. WRTL's tack, the District Court further noted, "followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement, and the PAC announcing as a priority 'sending Feingold packing.' " *Id.* at 9a (citation omitted). The District Court also concluded that WRTL, in addition to having failed to establish a substantial likelihood of success on the merits, failed to meet the remaining elements of the standard for obtaining a preliminary injunction. *See id.* at 9a-11a.

Following its denial of WRTL's motion for preliminary injunction, the District Court dismissed WRTL's lawsuit with prejudice. *Id.* at 1a. The District Court held that, "for the reasons set forth in its prior opinion," this Court's decision in *McConnell* "foreclosed" WRTL's as-applied challenge to BCRA Section 203. *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

For nearly a century, Congress has sought to prevent corporations and unions from using general treasury funds to influence federal elections. BCRA indeed represents only "the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *McConnell*, 540 U.S. at 115 (internal quotation marks & citation omitted). For its part, BCRA Section 203 only extends a longstanding prohibition against the use of corporate and union treasury funds for advertisements that expressly advocate the election or defeat of a federal candidate to cover a newly-defined form of communication—*i.e.*, electioneering

communications. Congress concluded, and record evidence demonstrates, this measure was needed to prevent corporations and unions from circumventing the pre-existing prohibition by funding advertisements with treasury revenues that, while falling short of express advocacy, were no less calculated to influence federal elections and likely had that effect. And in upholding BCRA Section 203 against a facial constitutional attack in *McConnell*, this Court foreclosed WRTL's present as-applied challenge to it. It upheld the prohibition on *all* advertisements meeting the statutory definition of electioneering communication, including so-called "grassroots lobbying," because those advertisements will *often* communicate a message of support for or opposition to a federal candidate. In any event, the three "grassroots lobbying" advertisements that WRTL sought to air during BCRA's pre-election blackout period constitute the very kind of communications that Congress sought to regulate with BCRA Section 203. They were likely designed to influence Senator Feingold's bid for reelection to the Senate and, if permitted to air, would likely have had precisely that effect.

ARGUMENT

I. BCRA SECTION 203 CLOSED A LOOPHOLE IN THE FEDERAL CAMPAIGN FINANCE REGIME THAT HAD BEEN EXPLOITED BY CORPORATIONS AND UNIONS IN PREVIOUS ELECTIONS.

"Since 1907, there has been continual congressional attention to corporate political activity, sometimes resulting in refinement of the law, sometimes in overhaul." *Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146, 153 (2003). BCRA Section 203 and the definition of "electioneering communication" fall into the former category. Although BCRA Section 203 extends the prohibition on the spending of corporate and union general treasury funds in connection with federal elections to encompass a newly-defined form of communication, since the Court's seminal ruling in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), "Congress' power to prohibit corporations and unions from using funds in their treasuries

to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U.S. at 203. Section 203 constitutes no more than a modification of pre-existing law needed to " 'plug [an] existing loophole' " in the prohibition on corporate and union general treasury expenditures in connection with federal elections. *United States* v. *International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 582, 585 (1957) (*UAW*) (quoting S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess. 38-39 (1947)).

1. This Court is mindful of the "historical prologue" of a challenged provision of federal election law. *Beaumont*, 539 U.S. at 156; *see UAW*, 352 U.S. at 570 ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."). This Court has recognized that the prohibition against corporate and union general treasury expenditures in connection with campaigns for federal elected office has long been a cornerstone of federal election law. *See Beaumont*, 539 U.S. at 152-154; *McConnell*, 540 U.S. at 115-118. That restriction reflects an abiding concern with the ability of corporations and unions, if left unchecked, to use their state-sanctioned privileges and ability to aggregate wealth to obtain unfair political advantages. *See Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990); *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U.S. 197, 207-208 (1982) (*NRWC*); *UAW*, 352 U.S. at 585.

Congress made its initial foray into the arena of campaign finance regulation in 1907. It responded to President Roosevelt's call for a ban on corporate political contributions "not with half measures, but with the Tillman Act," which "banned any corporation whatever from making a money contribution in connection with federal elections." *Beaumont*, 539 U.S. at 153 (internal quotation marks & citation omitted). After this first step, Congress took another one in 1925 by extending the Tillman Act's prohibition on corpo-

rate contributions to encompass "anything of value" and by criminalizing the giving and receiving of corporate contributions. *See NRWC*, 459 U.S. at 209 (citing Corrupt Practices Act, 1925, §§ 301, 313, 43 Stat. 1070, 1074). Congress later extended the coverage of this prohibition to include labor unions. *See NRWC*, 459 U.S. at 209 (noting that "union contributions in connection with federal elections were prohibited altogether" by the War Labor Disputes Act of 1943). And, later still, Congress extended the scope of this prohibition affecting corporate and union political activity to include not just contributions but also "expenditures." *See McConnell*, 540 U.S. at 117.

In its "steady improvement of the national election laws," Congress enacted FECA in 1972. *Id.* This statute, as this Court has explained, "ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures." *Id.* at 118. Specifically, FECA Section 441b, which constituted "merely a refinement of th[e] gradual development of the federal election statute," *NRWC*, 459 U.S. at 209, made it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any" federal election. 2 U.S.C. § 441b(a); *see Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241 (1986) (*MCFL*) (Section 441b "prohibits corporations from using treasury funds to make an expenditure in connection with any federal election."). The term expenditure, as defined by FECA, included "anything of value * * * for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). While barring expenditures of general treasury funds, however, FECA "expressly permitted corporations and unions to establish and administer separate segregated funds (commonly known as political action committees, or PACs) for election-related contributions and expenditures." *McConnell*, 540 U.S. at 118; *see MCFL*, 479 U.S. at 241 (Section 441b "requires that any [corporate or union] expenditure for [a federal election] purpose be financed by voluntary contributions to a segregated fund."); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 409-410 (1972).

2. FECA Section 441b's prohibition against corporate and union expenditures of "anything of value" in connection with federal elections was later modified by this Court in a way that, as discussed below, carried untoward consequences eventually prompting Congress to enact BCRA Section 203. In *MCFL*, this Court accepted the argument that FECA Section 441b "necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates" and held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 248-249. This requirement, the Court explained, stemmed from its own prior decision in *Buckley* v. *Valeo*, *supra*, which—in order to avoid vagueness and overbreadth concerns inhering in a different FECA provision touching on independent campaign expenditures—held that "expenditure encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.' " *MCFL*, 479 U.S. at 249 (quoting *Buckley*, 424 U.S. at 80). As the *MCFL* Court explained, *Buckley* "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." 479 U.S. at 249. The *Buckley* Court in fact specifically identified eight such "more pointed exhortations"—namely, "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." 424 U.S. at 44 n.52. In the years since *Buckley*, the "express advocacy" limitation has become "known as the 'magic words' requirement." *McConnell*, 540 U.S. at 191.

"As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures did not contain words of 'express advocacy.' " *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176, 525-526 (D.D.C.) (Kollar-Kotelly, J.) (footnote omitted), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003). More to the point, "corporations and labor unions could use their general treasury funds to pay for an advertisement *which influenced a federal election*, pro-

vided that the corporation or labor union did not use any of *Buckley*'s 'magic words' in the advertisement." *Id.* at 526 (emphasis added).

3. Those involved in the electioneering business have historically pressed the federal campaign finance law envelope. "[E]xperience demonstrates," this Court has said, "how candidates, donors, and parties test the limits of the current law." *Beaumont*, 539 U.S. at 155 (internal quotation marks & citation omitted). The prohibition contained in FECA Section 441b (qualified by the magic words requirement) proved no exception to this lesson of experience. In the years following this Court's decision in *MCFL*, corporations and labor unions tested FECA Section 441b's prohibition by making expenditures on advertisements that eschewed reliance on *Buckley*'s "magic words" but were no less effective at influencing federal elections than communications containing "pointed exhortations" of support for or opposition to candidates for federal office. "Approximately ten years after *MCFL*, during the 1996 election cycle, corporations and labor unions began aggressively to use general treasury funds to pay for 'issue advocacy' campaigns that avoided express advocacy but were designed to influence federal elections." *McConnell*, 251 F. Supp. 2d at 526 (Kollar-Kotelly, J.); *see also id.* at 201 (per curiam) ("It does not appear that prior to 1996, the practice of using issue advertising to influence federal elections was a widespread practice."); *id.* at 800 (Leon, J.) ("[C]orporations, interest groups, and unions began in 1996 to actively use treasury funds to sponsor issue advertisements that looked and sounded like campaign ads.") (internal quotation marks & citation omitted). Those advertisements "were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money." *McConnell*, 540 U.S. at 128.

4. During the issue advocacy boom of the late 1990s, "[c]orporations and unions spent hundreds of millions of

dollars of their general funds to pay for these ads." *Id.* at 127. The Annenberg Center for Public Policy, which has studied "issue advocacy" since the early 1990s, concluded that "the numbers of ads, groups, and dollars spent on issue advocacy * * * climbed" markedly from the 1996 to the 2000 election cycle. *McConnell*, 251 F. Supp. 2d at 879 (Leon, J.). It found that the 1995-96 election cycle saw about "$135 million to $150 million * * * spent on multiple broadcasts of about 100 ads." *Id.* Those numbers grew during the next election cycle: "[T]he Annenberg Center found that 77 organizations aired 423 advertisements at a cost of between $250 million and $340 million." *Id.* And during the "1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements." *Id.* In passing BCRA, the Annenberg Center's tracking of the rise of organizations' reliance on issue advocacy did not escape Congress's attention. *See* 147 Cong. Rec. S2455 (daily ed. Mar. 19, 2001) (statement of Sen. Snowe) ("Let there be no mistake. The record I intend to outline will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws."); *id.* at 2456 (statement of Sen. Snowe) (referencing 2001 Annenberg report).

5. The rise in issue advertisements was not a coincidence but a strategy adopted by organizations intent on influencing campaigns for federal offices in light of the express advocacy limit read into Section 441b's expenditure prohibition. Two judges on the three-judge District Court convened to review the pre-enforcement challenge to BCRA specifically found that these organizations used issue advertisements with the hope of influencing federal elections. Based on her review of the evidence, Judge Kollar-Kotelly concluded that "[i]t is therefore uncontroverted that by the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits

and source limits." *McConnell*, 251 F. Supp. 2d at 528 (internal quotation marks, alteration and citation omitted); *see also id.* at 529 (finding that "the uncontroverted record demonstrates that since the 1996 election cycle, candidate-centered issue advertisements have been used by corporations and labor unions to influence federal elections with general treasury funds.").

Judge Leon similarly concluded that "the record more than adequately demonstrates[ ] that in the twenty-eight years since *Buckley*, corporations, unions, and interest groups have increasingly affected federal elections by funding out of their general treasuries uncoordinated 'issue ads' that either they, or a political party, ran in the months leading up to an election." *Id.* at 799. He further explained that, "[i]n order to avoid regulation as express advocacy, those so-called 'issue advertisements' did not contain certain 'magic words' designed to support or oppose a specific candidate's election or re-election." *Id.* at 800.

> The ads, however, were constructed in such a way that they simultaneously presented their sponsors' stand on an issue, identified a specific candidate's positions or track record thereon, and under the guise of admonishing the viewer to inform the candidate of his view, suggested that a candidate who takes (or has taken) the candidate's position should (or should not) be elected to that office. [*Id.*]

He concluded that the "factual record unequivocally establishes that [issue advertisements] have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that." *Id.*

6. The line that *Buckley* drew between express advocacy and issue advocacy, which was later imported into FECA Section 441b in *MCFL*, was not only easily and frequently circumvented but largely illusory from the start. *Buckley* itself signaled as much:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest. [424 U.S. at 42.]

Indeed, this Court in *McConnell* confirmed that the express advocacy test is a "functionally meaningless" one, 540 U.S. at 193, 217: "While the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126.

Experience in fact powerfully demonstrated that the express advocacy test and the focus on "magic words" failed to identify accurately communications designed to influence elections for federal office. In *McConnell*, all three of the judges of the District Court agreed that few advertisements run by candidates, parties or interest groups rely on words of express advocacy. *See* 251 F. Supp. 2d at 303 (Henderson, J.); *id.* at 529 (Kollar-Kotelly, J.); *id.* at 874 (Leon, J.). A mere 4% of candidate advertisements during the 1998 election cycle contained "magic words," while only 5% did so during the 2000 election cycle. *McConnell*, 540 U.S. at 128 n.18. Judge Kollar-Kotelly concluded that "[t]he uncontroverted testimony of political consultants demonstrates that it is neither common nor effective to use the 'magic words' of express advocacy in campaign advertisements." 251 F. Supp. 2d at 529. Indeed, "[t]he unrebutted expert testimony" in the District Court "demonstrate[d] that only 11.4 percent of advertisements purchased by federal candidates that aired during the 2000 election cycle would qualify as electioneering under the 'magic words' test." *Id.* at 608; *see also id.* at 529 (citing "[e]mpirical study demonstrat[ing] that modern campaign advertisements do not use words of express advocacy" and that "88.6 percent of candidate advertisements

in 2000 were technically undetected by the *Buckley* magic words test") (internal quotation marks & citation omitted).

The record before the District Court demonstrated that media professionals actually disfavored such heavy-handed tactics. One political consultant explained that it "is rarely advisable" given "the modern world of 30 second political advertisements" to use "such clumsy words as 'vote for' or 'vote against.' " *Id.* at 529-530 (Kollar-Kotelly, J.); *see also id.* at 305 (Henderson, J.); *id.* at 874-875 (Leon, J.). The "most effective" course, as "[a]ll advertising professionals understand," is to "lead[ ] the viewer to his or her own conclusion without forcing it down their throat." *Id.* at 529-530 (Kollar-Kotelly, J.); *id.* at 875 (Leon, J.); *see also McConnell*, 540 U.S. at 193 n.77 (noting that "political professionals and academics confirm that the use of magic words has become an anachronism"). "This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians." *McConnell*, 251 F. Supp. 2d at 530 (Kollar-Kotelly, J.). The express advocacy limitation of course proved no substantial obstacle for this "modern" electioneering approach.

Members of Congress themselves—some of them "seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years"[3]—confirmed that the "magic words" of express advocacy "do not distinguish pure issue advertisements from candidate-centered issue advertisements." *Id.* at 532 (Kollar-Kotelly, J.). Senator Russ Feingold, for example, opined that "[p]eople didn't need to hear the so-called magic words to know what these ads were really all about." 147 Cong. Rec. S3072 (daily ed. Mar. 29, 2001), while Senator John McCain explained that "th[is] Court's definition of 'express advocacy'—magic words—has no real

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[3] *Buckley*, 424 U.S. at 261 (White, J., concurring in part & dissenting in part); *see also Colorado Republican Fed. Campaign Comm.* v. *Federal Election Comm'n*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting) ("Congress surely has both wisdom and experience in these matters that is far superior to ours.").

bearing in today's world of campaign ads." 147 Cong. Rec. S3036 (daily ed. Mar. 28, 2001); *see also* 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("[E]ven a casual observer would concede that 'magic words' is a dramatically underinclusive test for determining what constitutes a campaign ad."). Many other federal lawmakers expressed similar views on so-called issue advocacy.[4]

7. The widespread practice of using soft money to fund issue advertisements designed to influence campaigns for federal office was further documented in the six-volume

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[4] *See, e.g.*, 148 Cong. Rec. H387 (daily ed. Feb. 14, 2002) (statement of Rep. Cardin) ("Currently, these [issue] ads which are clearly aimed at influencing an election can be worded in a way that they are deemed issue advocacy and are not subject to campaign spending limits or disclosure requirements."); 148 Cong. Rec. H410 (daily ed. Feb. 14, 2002) (statement of Rep. Kleczka) ("An equally troubling aspect of today's campaign system is the number of issue advertisements broadcast on the television and radio. Although these ads technically adhere to federal campaign regulations, they violate the spirit of the law."); 147 Cong. Rec. S2636 (daily ed. Mar. 21, 2001) (statement of Sen. Edwards) ("In fact, [issue advertisements] are more than a masquerade, they are a sham, they are a fraud on the American people, and they are nothing but a means to avoid the legitimate election laws of this country."); 144 Cong. Rec. H6802 (daily ed. July 30, 1998) (statement of Rep. Shays) ("They are not sham in the sense that they do not have a right to speak, but they are not issue ads, they are campaign ads, and we call them such."); 144 Cong. Rec. S1038-39 (daily ed. Feb. 26, 1998) (statement of Sen. Bryan) ("Independent expenditure ads are one of the very reasons the campaign system is out of control. We all know that these ads are really intended to defeat a candidate and are often coordinated with the opposition campaign. Simply put, these ads are not genuinely independent nor are they strictly concerned with issue advocacy."). 143 Cong. Rec. S10125 (daily ed. Sept. 29, 1997) (statement of Sen. Collins) ("[T]he situation I have described [regarding 'issue' ads run by the AFL-CIO] has led to the biggest sham in American politics. Nobody in Maine believed that the AFL[-]CIO's negative ads were for any purpose other than the defeat of a candidate. Ads of that nature make an absolute mockery out of the prohibition against unions and corporations spending money on Federal elections. The 'express advocacy' provision in McCain-Feingold is designed to do away with this sham.").

report—spanning nearly 10,000 pages—that the Senate Governmental Affairs Committee (Committee), chaired by Senator Fred Thompson and led also by Ranking Member John Glenn, produced following its investigation into campaign finance law abuses during the course of campaigns for the presidency in 1996. *See Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167 (1998) (Thompson Report). This Court in *McConnell* characterized the Committee's findings as "disturbing." 540 U.S. at 122.

The Committee concluded that issue advertisements constituted "the second most significant loophole" in the preexisting campaign finance regime. Thompson Report at 5968 (minority views). The Committee "found such ads highly problematic for two reasons." *McConnell*, 540 U.S. at 131. First, because issue advertisements "accomplished the same purpose as express advocacy (which could lawfully be funded only with hard money), the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide." *Id.* Second, while the advertisements were "ostensibly independent of the candidates," they were "often actually coordinated with, and controlled by, the campaigns." *Id.* "The ads thus provided a means for evading FECA's candidate contribution limits." *Id.* The Committee's findings bear out these conclusions.

Looking broadly at the problem posed by issue advocacy, the Thompson Report found that both national parties used soft money to fund issue advertisements intended to influence the 1996 presidential election. The Democratic National Committee (DNC) spent $44 million on issue advertisements during the 1996 presidential election, while the Republican National Committee (RNC) spent $24 million. *See* Thompson Report at 4482; *id.* at 8294 (minority views). When Harold Ickes, President Clinton's Deputy Chief of Staff, was asked during the Committee hearings whether the average person would comprehend the DNC and RNC's issue advertisements as encouraging a vote for one of the presidential candidates, he responded that "I would certainly

hope so. If not, we ought to fire the ad agencies." *Id.* at 8286 (minority views).

The 1996 presidential candidates themselves tended to share this view toward issue advertisements funded by soft money. That President Clinton fully appreciated the impact of issue advertisements on his campaign for a second presidential term is apparent in his telling major contributors to the DNC that their contributions, which funded advertisements "run * * * through the Democratic party," rather than his campaign, "have made a huge difference." *Id.* at 62. Senator Dole's campaign deployed this strategy as well. The Report concluded that "there can be little doubt that the RNC's issue ads were intended to influence the outcome of a federal election." *Id.* at 4014. One of those advertisements, entitled "The Story," the Thompson Report concluded, "was nothing more than a biography of Bob Dole." *Id.* Senator Dole's campaign manager, Scott Reed, acknowledged that "[w]e went out in April and May and raised $25 million for the party, of which about $17, $18 or $19 million was put into party building ads, which were Bob Dole in nature." *Id.* at 8301 (minority views). In an interview with Ted Koppel of ABC News, Senator Dole explained that, while his campaign could not afford to fund advertisements lauding his candidacy, the RNC ran "generic" ads on his behalf. *Id.* at 4153-54. Questioned whether "Bob Dole for President" constitutes "generic spending," Senator Dole explained that such generic advertisements "never say[ ] that I'm running for president, though I hope that it's fairly obvious, since I'm the only one in the picture!" *Id.* at 4154.

The Thompson Report further detailed the extent to which the national parties coordinated their issue advertisements with the campaigns of their presidential candidates. As for the DNC, the report concluded that the White House essentially "operated the [DNC] party apparatus as a slush-fund for the President's re-election campaign." *Id.* at 23. The Clinton/Gore campaign and the DNC used the same consultants, pollsters and media producers, *id.* at 34, and even coordinated the day on which their respective advertisements

would run, *id.* at 118. Indeed, Dick Morris, a campaign advisor to President Clinton, stated that the President himself was so involved in the creation of all of the DNC and Clinton/Gore campaign advertisements that they essentially " 'became * * * the work of the President himself.' " *Id.* at 122. This "unprecedented" level of coordination, the Thompson Report concluded, led to the "oblitera[tion]" of any "distinctions remaining between the White House, the DNC, and [the] Clinton/Gore [campaign]." *Id.* at 107.

Similar findings were made in regard to the RNC and Senator Dole's campaign. The RNC's media campaign was controlled by Senator Dole's "campaign manager, chief fundraiser, media consultant, and pollster." *Id.* at 8297 (minority views). And "the criterion used by the RNC and the Dole campaign for deciding where to run issue ads was whether the ads would help Senator Dole win electoral votes." *Id.* at 8299 (minority views).

The Thompson Report further concluded that, just as the national parties exploited the issue-advocacy loophole, so, too, did corporations and unions. It found that such organizations spent "roughly one-seventh of the 400 million dollars expended on political advertising during the 1996 elections by parties, candidates and others." *Id.* at 3993. These advertisements—like the ones produced by the parties—were likewise intended to influence federal elections. *See id.* at 3997. They were indeed often coordinated with the campaigns of the 1996 presidential candidates or the national parties with which they were associated. *Id.* The Thompson Report found, for example, that "[e]vidence * * * indicates [that AFL-CIO] programs were conceived, designed and implemented to defeat Republican Members of Congress during the 1996 elections." *Id.*; *see also id.* at 49 ("White House aides and the AFL-CIO carefully reviewed each other's advertisements and coordinated their timing and placement."). Dick Morris additionally testified during the Committee hearings that an August 1995 meeting between representatives of the Clinton/Gore campaign, the DNC and

seven labor organizations constituted " 'a full briefing of us by them on their media plans.' " *Id.* at 128.

Groups backing Republican candidates similarly used issue advertisements in an attempt to influence federal elections. For instance, The Coalition: Americans Working for Real Change, a group formed to counter issue advertisements aired by the AFL-CIO, produced issue advertisements nearly identical to advertisements run by the National Republican Congressional Committee (NRCC), a division of the RNC, aired them at the same time as the NRCC's advertisements and "in districts where the Republican incumbent's seat was vulnerable." *Id.* at 8944 (minority views). Another group, Triad Management Services, "channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.' " *Id.* at 4569 (minority views). "By operating this way, Triad and its financial backers avoided the disclosure and campaign contribution limits of the federal election laws." *Id.* They became "surrogates" by which the RNC "was able to circumvent federal campaign finance laws." *Id.* at 5979 (minority views). This was so because whereas "a political party [that] broadcasts issue ads * * * is required to pay for them with a combination of hard dollars and soft dollars," when "an outside group runs such ads, there are no such restrictions—even if the funding comes from the RNC." *Id.*

The Thompson Report concluded that repairs to the campaign finance laws must involve restrictions on issue advocacy. "The majority expressed the view that a ban on the raising of soft money by national party committees would effectively address the use of union and corporate general treasury funds in the federal political process only if it required that candidate-specific ads be funded with hard money." *McConnell*, 540 U.S. at 132; *see also* Thompson Report at 4492. The minority similarly recommended "reforms addressing candidate advertisements masquerading as issue ads." Thompson Report at 9394 (minority views); *see also McConnell*, 540 U.S. at 132.

8. "*Buckley*'s express advocacy line [did] not aid[ ] the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 193-194. The legislative process culminating in the passage of BCRA spanned more than six years and generated multiple reform bills introduced in Congress. *See McConnell*, 251 F. Supp. 2d at 434 (noting that "the legislative process took over six years of study and reflection by Congress") (Kollar-Kotelly); *id.* at 434 n.1 (listing campaign finance bills introduced in Congress during six-year period preceding enactment of BCRA). This process was influenced by the failings of the pre-BCRA campaign finance regime brought to light by the Thompson Report as well as the reforms that the report proposed.[5] Senator Feingold, for example, opined that, "in the wake of the Thompson investigation, we reluctantly concluded that we need to first focus our efforts on closing the biggest loopholes in the system: the soft money and the phony issue ads." 148 Cong. Rec. S2104 (daily ed. Mar. 20, 2002). Senator Glenn similarly noted that the Thompson Report "showed that the legal distinction between 'issue ads' and 'candidate ads' has proved to be largely meaningless" and that the legislation under consideration "goes a long way to address[ing] th[is] abuse." 144 Cong. Rec. S1048-49 (daily ed. Feb. 26, 1998).

9. BCRA Section 203 directly combats the well documented problem of issue advertisements that skirted the express advocacy limitation but nevertheless had the purpose and likely effect of influencing campaigns for federal elected office. That section extended FECA's pre-existing prohibition on the use of corporate and union general treasury funds

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[5] The House and Senate bills that ultimately became BCRA were not accompanied by the customary explanatory committee reports. Members of Congress frequently relied on the Thompson Report's findings in floor debates on BCRA, however. *See, e.g.*, 147 Cong. Rec. S3138 (daily ed. Mar. 29, 2001) (statement of Sen. Levin) ("The 1997 Senate investigation collected ample evidence of campaign abuses, the most significant of which revolved around the soft money loophole.").

to finance communications influencing federal elections—which prohibition, in light of this Court's narrowing statutory construction in *MCFL*, previously was limited to those expressly advocating election or defeat of a particular candidate—to cover any "electioneering communication." 2 U.S.C. § 441b(b)(2). BCRA contained two definitions of the new statutory term that Congress coined, a primary and a back-up definition. Only BCRA's primary definition is relevant here. It identifies electioneering communications as (1) any "broadcast, cable or satellite communication" that (2) "refers to a clearly identified candidate for Federal office"; (3) is made within either 60 days preceding a federal general election, or 30 days preceding a federal primary election, for the office the candidate seeks; and (4) is "targeted to the relevant electorate," 2 U.S.C. § 434(f)(3)(A)(i), meaning that the communication must be received by 50,000 or more persons in the "relevant congressional district or state." *McConnell*, 251 F. Supp. 2d at 212 (per curiam). "Thus, under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *McConnell*, 540 U.S. at 204.

Congress's new term—"electioneering communication"—is carefully calculated to identify (and block) corporate and union general treasury expenditures on broadcast advertisements intended to influence federal elections that escaped detection under *Buckley*'s express advocacy radar. "By adopting a definition of electioneering communication that by and large is premised on the empirical determinants that Congress found distinguish pure issue advocacy from candidate-centered issue advocacy," as Judge Kollar-Kotelly explained, "Congress adopted a definition of electioneering communication that rejected reliance on the subjective impressions of the listener and focuses on objective variables that do an impressive job * * * of distinguishing between candidate-centered issue advertising and pure issue advertising." *McConnell*, 251 F. Supp. 2d at 569. Indeed, she found that "the uncontroverted record establishes that pure issue

advocacy is empirically distinguishable from candidate-centered issue advocacy on the basis of (a) whether the federal candidate is named; (b) whether the advertisement is run in close proximity to a federal election; and (c) if the advertisement is run in a competitive race." *Id.* at 567.

Each criterion of Congress's new term is bottomed on empirical evidence. *First*, the definition of electioneering communication takes aim only at media "found by Congress to be problematic." *Id.* at 569. "The records developed in [the BCRA pre-enforcement] litigation and by the Senate Committee adequately explain the reasons for this legislative choice." *McConnell*, 540 U.S. at 207. As Judge Kollar-Kotelly explained, the evidence developed in the context of the pre-enforcement challenge to BCRA "demonstrates that more than any other medium, broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections." *McConnell*, 251 F. Supp. 2d at 573. She quoted the views of experts and media consultants that confirmed that "broadcast advertising is the most prevalent form of communicating candidate-centered issue advocacy." *Id.* at 569. The Thompson Report further evidenced Congress's finding that "corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections." *McConnell*, 540 U.S. at 207. *See* Thompson Report at 4465, 4474-4481; *id.* at 7521-7525 (minority views).

Second, the definition of electioneering communication encompasses only messages that refer to clearly identified candidates for federal elected office. During the pre-enforcement challenge, "[f]ederal officeholders and candidates * * * testif[ied] that, based on their experience, the intent behind issue advertisements that mention the name of a federal candidate, are aired right before the election, and broadcast to the candidate's electorate, is to influence the election." *McConnell*, 251 F. Supp. 2d at 534 (Kollar-Kotelly). These politicians' intuitions were confirmed by political consultants' "uncontroverted testimony that when

designing pure issue advertisements, it was never necessary to reference specific candidates for federal office in order to create effective ads." *Id.* at 628 (internal quotation marks & ellipsis omitted). As Judge Kollar-Kotelly explained, moreover, the rather obvious "flip side of this coin * * * is that when advertisements do mention a candidate's name, particularly in the period preceding an election, the advertisement's primary purpose is usually to influence the election." *Id.*

Third, the 30 and 60 day pre-election blackout periods applicable to electioneering communications also strongly correlate to the periods during which advertisements aimed at influencing federal elections are most likely to air—the time period, not surprisingly, immediately preceding a federal election. Judge Kollar-Kotelly concluded that "[t]he uncontroverted testimony of experts confirms that the airing of issue advertisements designed to influence a federal election is at its zenith in the final weeks prior to an election." *Id.* at 564-565; *see also id.* at 630. Her opinion includes a graph showing that the number of issue advertisements rises as an election day nears and dramatically spikes in the weeks immediately preceding an election. *Id.* at 564. As one media consultant testified: "In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections." *Id.* at 561. This consultant confirmed the common-sense proposition that, "[f]rom a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election." *Id.* And, in *McConnell*, this Court similarly concluded that, although "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief [30 and 60 day] preelection time spans but had no electioneering purpose is a mater of dispute * * * the *vast majority* of such ads clearly had such a purpose." 540 U.S. at 206 (emphasis added) (citations omitted).

Fourth, the definition of electioneering communication is keyed to messages that are targeted to the electorate relevant

to the candidate to which the message refers. This component of the definition accounts for the fact that messages that "target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude." *McConnell*, 251 F. Supp. 2d at 633 (Kollar-Kotelly). Officeholders and candidates confirmed that the point of issue advertisements delivered to a candidate's electorate is to influence the election. *Id.* at 534.

Acknowledging that "Congress' careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference," 540 U.S. at 117 (internal quotation marks & citations omitted), this Court upheld Congress's corrective measure embodied in BCRA Section 203, and BCRA's primary definition of "electioneering communication" on which it relies, against constitutional attack in *McConnell*, *see id.* at 189-194, 203-209.

The deference that this Court in *McConnell* showed Congress is especially appropriate "in [this] area where it enjoys particular expertise." *Id.* at 185 n.72. And showing Congress such deference comports with this Court's admonition that "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted). So too in this case, the Court owes "no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Id.*

II. *McCONNELL* FORECLOSED WRTL'S AS-APPLIED CHALLENGE TO BCRA SECTION 203 IN REJECTING A FACIAL CHALLENGE TO THAT PROVISION.

WRTL maintains that this Court, in *McConnell*, left open the possibility of an as-applied First Amendment challenge to

BCRA Section 203 for so-called "grassroots lobbying." *See* Appellant's Br. at 13-15. WRTL fundamentally mistakes the import of this Court's upholding of BCRA Section 203—as well as the related primary definition of "electioneering communication"—in the face of a facial First Amendment challenge. In *McConnell*, the Court concluded that there is no "inviolable First Amendment right to engage" in issue advocacy and that, given the constitutional and practical irrelevancy of the issue/express advocacy dichotomy, Section 203 imposed a permissible—indeed slight—burden on that speech right. *McConnell*, 540 U.S. at 190. The Court did not ignore that the prohibition on electioneering communications would encompass some *bona fide* issue ads—"grassroots lobbying" in WRTL's nomenclature—but concluded that that burden was minimal and outweighed by the need for an "easily understood and objectively determinable" rule to replace the defunct express advocacy test. By holding Section 203 constitutional in not some—but *all*—of its applications, this Court therefore precluded the very type of as-applied constitutional challenge WRTL now brings.

1. The Court in *McConnell* made clear that nothing inherent in the First Amendment compels special treatment of issue advocacy. The Court in fact flatly "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." *McConnell*, 540 U.S. at 194; *see also id.* at 195 (noting "failed argument that BCRA * * * improperly extend[s] to both express and issue advocacy").

The *McConnell* Court held that the distinction between issue and express advocacy that was introduced in *Buckley* and perpetuated in *MCFL* is of a statutory construction—not a *constitutional*—pedigree. *Buckley* and *MCFL* hewed to no "constitutionally mandated line," *id.* at 190, but created and implemented the express advocacy requirement to cure vagueness and overbreadth concerns with previous federal election laws. The *McConnell* Court confirmed repeatedly that the "express advocacy restriction was an endpoint of statutory construction, not a first principle of constitutional

law." *Id.* at 190; *see id.* at 191-192 ("[A] plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command."); *id.* at 192 ("[T]he concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities."); *id.* at 192 ("[O]ur decisions in *Buckley* and *MCFL* were specific to the statutory language before us."). The express advocacy limitation thus "in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *Id.* at 192-193. As the Court pointed out, issue advocacy is entitled to no greater First Amendment protection than express advocacy. *See id.* at 205 (citing *Buckley*, 424 U.S. at 48, and *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)).

McConnell concluded that imposing such a "constitutional boundary" would be a fool's errand in any event. The Court confirmed in *McConnell* what *Buckley* recognized all along: A constitutional principle premised on a supposed distinction between issue and express advocacy would be of dubious value as that distinction makes no real-world difference. The Court explained that the idea that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy" conflicts with its "longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *McConnell*, 540 U.S. at 193. That requirement, based on the "unmistakable lesson" of the District Court litigation, was indeed "functionally meaningless." *Id.* Not only are advertisers adept at avoiding use of *Buckley*'s magic words, but, even if permitted to use those verbal formations, they would "seldom" choose to do so. *Id.* That language-based restriction thus did little to help Congress stamp out corruption and its appearance in federal politics. *See id.* at 194.

2. Recognizing "that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled," *id.* at 204-205, the *McConnell* Court held that

the interests justifying Section 203's prohibition on electioneering communications funded with corporate and union treasury revenues required upholding Section 203's constitutionality in all applications, including the one at issue in this case, *see id.* at 190 n.73, 204-208. The Court directly countered the claim that the prohibition was unconstitutional because it encompassed some *bona fide* issue ads by explaining that, "[f]ar from establishing that BCRA's application to pure issue ads is substantial, either in the absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion" and, moreover, "amply justifie[d] Congress's line drawing." *Id.* at 207. While, as WRTL points out, the Court entertained the "assum[ption] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," *id.* at 206 n.88, the Court found that the burden imposed by BCRA Section 203 is one that corporations and unions are relieved of easily enough, *id.* at 207. The Court recognized that corporations and unions had the option to fund such advertisements during pre-election blackout periods "by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206; *see also id.* at 204 ("Because corporations can still fund electioneering communications with PAC money, it is simply wrong to view the provision as a complete ban on expression rather than a regulation.") (internal quotation marks omitted). It is therefore no surprise that, rather than highlighting the possibility of as-applied challenges in this BCRA context as it did in several others, the Court instead noted that it was upholding BCRA's regulation of electioneering communications in "*all* applications." *Id.* at 190 n.73 (emphasis added). Later in its opinion, the Court indeed specifically acknowledged the preclusive effect that its holding had for later as-applied challenges in characterizing it as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey a message of support or opposition." *Id.* at 239.

3. The very flexibility of our language doomed the use of *Buckley*'s express-advocacy test for accurately identifying corporate and union general-treasury-funded communications that were intended and had the likely effect of influencing federal elections. *McConnell* recognized that Congress's regulation of federal elections with a statute that is neither vague nor overboard indeed need not "toe the same express advocacy line" drawn in *Buckley*. *McConnell*, 540 U.S. at 192. Unlike that "functionally meaningless" line, the new one that Congress drew with BCRA consists of components that are "both easily understood and objectively determinable." *Id.* at 194. If this standard is qualified by an exception for "grass-roots lobbying" that otherwise meets the statutory definition of an electioneering communication deemed constitutional in *McConnell*, the virtues of Congress's new line will be lost by reintroducing a large measure of indeterminacy (given the flexibility of our language) into a test keyed to objective, empirically-based factors. As "experience demonstrates," candidates, donors, and parties will undoubtedly "test the limits" of this novel exception. *Beaumont*, 539 U.S. at 155 (internal quotation marks & citation omitted). And the creation of that new exception can be expected to lead to a renaissance in the circumvention of the longstanding prohibition against the use of corporate and union general treasury funds to influence federal elections that prompted Congress to act in the first place.

III. WRTL'S BROADCASTS ARE NOT GRASS ROOTS LOBBYING IN ANY EVENT.

1. In ruling on WRTL's preliminary injunction motion, the District Court properly surmised that—even if an as-applied challenge to Section 203 were viable for issue advocacy falling into the category of "grassroots lobbying"—WRTL's broadcast advertisements "fit the very type of activity that *McConnell* found Congress had a compelling interest in regulating." J.S. App. 8a. The timing and substance of WRTL's planned broadcasts belie any notion that they are intended as "grassroots lobbying" and instead confirm that they subtly—but nevertheless clearly—suggest a vote against

Senator Feingold based on his perceived stance on the judicial filibuster issue. Thus these broadcast advertisements are of the type "functionally identical" to express advocacy messages that Congress, through BCRA, sought to bring within the ambit of the federal campaign finance regime—an effort this Court approved of in *McConnell*.

2. The three advertisements that WRTL sought to air during the pre-election blackout period would, as this Court warned, lead any objective observer to conclude that they are likely designed to "convey [a] message" opposing a candidate for federal office—namely, Senator Feingold. *McConnell*, 540 U.S. at 239. As the District Court noted, WRTL's PAC announced that Senator Feingold's defeat was a priority and, toward that end, endorsed three candidates running against him. J.S. App. 5a. WRTL itself issued a news release critical of his record on the judicial filibuster issue. *See id.* Despite using other, non-broadcast media to convey its anti-judicial-filibuster message, however, WRTL only turned to the broadcast media (and its advertisements playing on the needless-delay theme) in the run up to the BCRA pre-election blackout period. *See id.* at 5a, 9a. And all of the broadcast advertisements that WRTL sought to air during that blackout period connect Senator Feingold to a "group of U.S. Senators * * * blocking qualified [judicial] nominees from a simple 'yes' or 'no' vote" by encouraging the listener (or, in the case of the "Waiting" advertisement, viewer) to contact Senator Feingold and tell him "to oppose the filibuster." *Id.* at 13a ("Wedding"); *see also id.* at 15a, 17a. Thus "[t]he notion that th[ese] advertisement[s] w[ere] designed purely to discuss the issue of [judicial filibusters] strains credulity." *McConnell*, 540 U.S. at 194 n.78.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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